TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 554

LAWRENCE ROBINSON, APPELLANT,

v.

CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN.

FILED AUGUST 31, 1901.

JURISDICTION NOTED NOVEMBER 25, 1901.

SUPREME COURT OF THE UNITED STATES

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INDEX

1 MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PEOPLE OF THE STATES OF CALIFORNIA, *Plaintiff*,

v.

LAWRENCE ROBINSON, *Defendant*.

CLERK'S TRANSCRIPT

Docket Entries

Feb. 5, 1960

Complaint filed sworn to by T. M. Lundquist charging the Defendant with having on February 4, 1960 at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to-wit:

Violation Section 11721 of the State Health and Safety Code, a misdemeanor.

Feb. 5, 1960

Warrant Issued.	Bail Set at	$1000.00
	Penalty Assessment	$ 50.00
	Total before release	$1050.00

Feb. 6, 1960

Cause called, Judge R. Morgan Galbreth presiding. Both parties ready. People represented by C. A. Davis (D.C.A.) Defendant represented by Deputy Public Defender for arraignment only, Benjamin D. Avan. Defendant in court, duly arraigned, informed of the charge against him and of his legal rights. Defendant gives true name as charged and enters his plea of not guilty of the offense charged.

Defendant with counsel in open court each personally demands jury trial. Trial set for March 3, 1960 at 9 A.M. in Div. 20.

Bail	$500.00
Penalty Assessment	$25.00
Total before release	$525.00

Defendant committed.

Feb. 6, 1960

$525.00 surety bond approved and filed.
(National Automobile & Casualty Ins. Co.)

Mar. 2, 1960

In the following case James Morris Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge William H. Rosenthal presiding. Both parties ready. People represented by Jack D. Scott (D.C.A.) Defendant in court and represented in propria persona.

Cause continued for trial to April 4, 1960 at 9 A.M. on defendants motion.

Defendant personally waives statutory time for trial.

Bail up to stand.

Apr. 1, 1960

In this case Arlene Jenkins Reporter is ordered to take down proceedings as provided by law.

Div. 20 convened at 9 A.M., Cause called. Judge William H. Rosenthal presiding. Both parties ready. People represented by Jack D. Scott (D.C.A.) Defendant in court and represented in propria persona; J. B. Nisbet Deputy Clerk.

2 Cause continued to May 4, 1960 at 9 A.M.
Defendant waives time for trial.

Bail up to stand.

May 2, 1960

In the following case Patricia A. Minter Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge William H. Rosenthal presiding. Both parties ready. People represented by Jack D. Scott (D.C.A.) Defendant in court and represented by S. McMorris.

Cause continued for trial to June 3, 1960 at 9 A.M. on defendants motion.

Defendant personally waives statutory time for trial.

Bail up to stand.

Jun. 3, 1960

In this case Mary Belle Wright Reporter is ordered to take down proceedings as provided by law.

Div. 20 convened at 9 A.M., Cause called. Judge William H. Rosenthal presiding. Both parties ready. People represented by Jack D. Scott (D.C.A.) Defendant in court and represented by S. McMorris; J. B. Nisbet Deputy Clerk.

Transferred to Division 13 for trial.

Jun. 3, 1960

In this case Pat Minter Reporter is ordered to take down proceedings as provided by law.

Div. 13 convened at 2 P.M. Cause called. Judge Kenneth L. Holaday presiding. Both parties ready. People represented by Sanford Gage (D.C.A.) Defendant in court and represented by Samuel McMorris; G. A. Spence Deputy Clerk.

Recess to 9:30 A.M. June 6, 1960. Witnesses instructed to return.

Jun. 6, 1960

In this case Charles Deming Reporter is ordered to take down proceedings as provided by law.

Div. 13 convened at 9:30 A.M. Cause called. Judge Kenneth L. Holaday presiding. Both parties ready. People represented by Sanford Gage (D.C.A.) Defendant in court and represented by Samuel McMorris, G. A. Spence Deputy Clerk.

Following jurors sworn, examined and accepted:

1. Mrs. Grace M. Seely
2. Mrs. Gladys Eade
3. Mrs. Georgia D. Lemare
4. Lee G. Wong
5. Emery C. Pereszlenyi
6. Mrs. Gale L. Kendall
7. Mrs. Viola Polk
8. Mrs. Ines N. Rufer
9. Hugh W. Waldron
10. Mrs. Esther L. Walther
11. Mrs. Guadalupe F. Hinckle
12. Melvin L. Engle

3 Jun. 6, 1960

Jury sworn to try cause.

Recess to 2 P.M. Witnesses instructed to return. Jury admonished.

At 2 P.M. Cause called. Stipulated that jury and all parties are present as before.

Witness sworn and examined for People:

Lawrence Brown

The following proceedings, held out of the presence of the jury, pertain to the question of lawful or unlawful search.

Witness sworn and examined for People:

Lawrence Brown

People rest.

Witnesses sworn and examined for Defendant:

Ruth Fairley

Lawrence Robinson

Defendant rests.

Court decides issue of "search" in favor of People.

Jury returned into court.

Recess to 9:30 A.M. June 8, 1960.

Witnesses instructed to return. Jury admonished.

Jun. 8, 1960

In this case Elaine Rasmussen Reporter is ordered to take down proceedings as provided by law.

Div. 13 convened at 9:30 A.M. Cause called. Judge Kenneth L. Holaday presiding. Both parties ready. People represented by Sanford Gage (D.C.A.) Defendant in court and represented by Samuel McMorris; G. A. Spence Deputy Clerk.

At 9:30 A.M. Cause called. Stipulated that jury and all parties are present as before.

Oral motion of defendant for dismissal, made out of presence of jurors on grounds of lack of probable cause—Denied.

The following proceedings held in the presence of the jury:

Witnesses sworn and examined for People:

4 Jun. 8, 1960

Lawrence Brown resumes stand.
Theodore Lundquist
Lawrence Brown recalled.

People's Exhibits:
1. Photo
2. Photo
3. Photo

People rest.

Oral motion of defendant, made out of presence of jurors, for directed verdict—Denied.

Witnesses sworn and examined for Defendant:
Lawrence Robinson
Ruth Fairley

Recess to 2 P.M. Witnesses instructed to return. Jury admonished.

At 2 P.M. Cause called. Stipulated that jury and all parties are present as before.

Witnesses sworn and examined for Defendant:
Ruth Fairley resumes stand.
Ruby Robinson
Lawrence Robinson recalled.

Defendant rests.

Oral motion of defendant, made out of presence of jurors, for directed verdict—denied.

Cause argued, jury instructed, partially.

Recess to 9:30 A.M. June 9, 1960. Jury admonished.

Jun. 9, 1960

In this case Elena Rasmussen Reporter is ordered to take down proceedings as provided by law.

Div. 13 convened at 9:30 A.M. Cause called. Judge Kenneth L. Holaday presiding. Both parties ready. People represented by Sanford Gage (D.C.A.) Defendant in court and represented by Samuel McMorris; G. A. Spence Deputy Clerk.

At 9:30 A.M. Cause called. Stipulated that jury and all parties are present as before.

Jury instructed, instructions filed.

5 Jun. 9, 1960

Jury retired this June 9, 1960 at 9:45 A.M. in charge of Bailiff Jerome Shapiro duly sworn, at this 12:01 P.M. jury return into court with the following verdict:

"We, the Jury in the above entitled cause, find the defendant guilty of the offense charged.

Melvin L. Engle, Foreman."

Verdict filed.

Continued for sentence to June 22, 1960 at 9:30 A.M. on motion of defendant.

Bail up to stand.

Jun. 22, 1960

In this case May Jo Ammerman Reporter is ordered to take down proceeding as provided by law.

Div. 13 convened at 9:30 A.M., Cause called. Judge K. Holaday presiding. Both parties ready. People represented by George Franscell (D.C.A.) Defendant in court and represented by Samuel McMorris; G. A. Spence Deputy Clerk.

Cause continued from June 9, 1960 for sentence.

Oral motion of defendant to arrest judgment—Denied.

Oral motion of defendant for new trial—Denied.

Proceedings suspended without imposition of sentence and defendant placed in custody of Probation Officer for a period of 2 years subject to the following terms of probation.

1. Serve first 90 days County Jail
2. Take Nalline Test at such times and places as directed by Probation Officer.
3. Remain gainfully employed.
4. Obey all laws.
5. Comply with directions of Probation Officer and Court.

Bail ordered exonerated.

Defendant committed.

Defendant's "Notice of Appeal" filed.

Bail on Appeal at $500 plus $25 P.A.

In lieu commitment issued.

Defendant committed. (County Jail)

6 Jun. 22, 1960

$525.00 surety bond approved and filed.
(National Auto. & Cas. Ins. Co.) on Appeal.
Release #55992 issued.

Jun. 27, 1960

Proposed Statement on Appeal filed with Affidavit of Service by Mail.

Jul. 22, 1960

Order granting Relief for Default to file Reporter's Transcript received and filed from the Appellate Department of the Superior Court.

Aug. 11, 1960

Application for Extension of Time for Filing Transcript filed.

Aug. 26, 1960

Reporter's Transcript filed by C. E. Deming and Elena Rasmussen.

Sep. 29, 1960

Hearing to settle Statement on Appeal and Reporter's Transcript set for October 11, 1960 at 9:30 A.M. in Div. 13.
Notices mailed with Affidavit of Service by Mail.

Oct. 11, 1960

In the following case P. A. Duran Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge Kenneth L. Holaday presiding. Both parties ready. People represented by Lawrence Moreno (D.C.A.) Defendant not in court and not represented (Samuel C. McMorris is counsel of record)

Cause called for hearing on Settlement of Statement on Appeal and Reporter's Transcript.

The Court does now settle and allow that portion of the Statement on Appeal on page one thereof, beginning with line eighteen and ending with the word "transcript" on line nineteen, and Reporter's Transcript, as corrected, of a portion of the proceedings had upon the trial and certifies that the same is true and correct.

7 Oct. 17, 1960

Files on Appeal transmitted to the Appellate Department of the Superior Court this date.

Nov. 15, 1960

Order granting relief from default filed. Appellant to file an additional reporter's transcript on or before February 14, 1961.

Feb. 14, 1961

Reporter's transcript filed by Elena Rasmussen.

Feb. 15, 1961

Cause called. Judge Kenneth L. Holaday presiding. People not represented. Defendant not in court and not represented.

It appearing to the court that a partial transcript has been filed, pursuant to an order of the Appellate Department of the Superior Court. It is now hereby ordered that the case be set for hearing on settlement of the partial transcript on February 21, 1961 in Division 13 at 9:30 A.M.

The clerk is ordered to send notice to the attorneys for the People and for the defendant.

Feb. 15, 1961

Notices mailed.

Feb. 21, 1961

In the following case George Kraft Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge Kenneth L. Holaday presiding. People represented by Sanford Gage (D.C.A.) Defendant not in court and not represented.

The transcript filed on February 14, 1961 pages 72 to 134 as corrected, is certified as a true and correct transcript of a part of the proceedings had upon the trial, and the same is settled, allowed and made a part of the record of this case.

8 (File endorsement omitted)

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Booking No. 037272

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff*,

vs.

LAWRENCE ROBINSON, *Defendant*.

Complaint

Personally appeared before me, the undersigned, who, first being duly sworn, complains and says: That on or about February 4, 1960, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to wit:

VIOLATION of Section 11721 of the Health and Safety Code was committed by LAWRENCE ROBINSON (whose true name to affiant is unknown), who at the time and place last aforesaid, was a person who did wilfully and unlawfully use, and be under the influence of, and be addicted to the use of narcotics, said narcotics not having been administered by and under the direction of a person licensed by the State of California to prescribe and administer narcotics.

All of which is contrary to the law in such cases made and provided, and against the peace and dignity of the People of the State of California. Said Complainant therefore prays that a warrant may be issued for the arrest of said Defendant ..... that ..... he ..... may be dealt with according to law.

Subscribed and sworn to before me on
February 5, 1960

T. M. LUNDQUIST
T. M. Lundquist

(SEAL)

George J. Barbour, Clerk of the Municipal Court of Los Angeles Judicial District, in said County and State.

By K. HOVEY, *Deputy Clerk*

10

9

No. 114162

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff*,

vs.

LAWRENCE ROBINSON, *Defendant*.

COMPLAINT

Filed February 5, 1960

GEORGE J. BARBOUR,
Clerk of the Municipal Court
of Los Angeles Judicial District,
County of Los Angeles, State of California.

By K. HOVEY
Deputy Clerk.

Issued by
ROGER ARNEBERGH
City Attorney

By PERRY THOMAS
Perry Thomas
Deputy City Attorney.

WITNESSES:
L. E. Brown 7783
S. T. Wapato 10121
Wils. FC
T. M. Lundquist 2623 Narc.

Mar. 2, 1960

P.P.
Cont. to 4/4 900
T.W.

Apr. 4, 1960

P.P.

Apr. 1, 1960

Cont. to May 4 900
T.W.

May 2, 1960

S. McMorris

Deft just obtained counsel--requested continuance—continued to June 3 900

T.W.

Last continuance

MUNICIPAL COURT PROCEEDINGS

Date

Feb. 5, 1960

Warrant Issued. Bail set at $.....

Bail	$1,000
Penalty Assessment	$ 50
Total before release	$1,050

Defendant in Court duly arraigned, informed of charge against him and of his legal rights. Defendant gives true name as charged .....and enters his plea of not guilty of the offense charged.

Denies—Admits—prior conviction .....charged.

Bail fixed at $500 Dollars.

Feb. 6, 1960

Jury Mar. 3, 1960 9 am

Pleads Not Guilty Jury Div. 20

Bail	$500
Penalty Assessment	$ 25
Total before release	$525

Defendant committed

Feb. 6, 1960

$525 surety bond approved and filed.

(National Automobile & Casualty Ins. Co.)

Trial argued and denied

(SEAL)

Feb. 6, 1960

10 No. 114162 People vs Lawrence Robinson

ADDITIONAL MUNICIPAL COURT PROCEEDINGS

Attorney Samuel McMorris

Date

Jun. 3, 1960

Cont. 1:30
Div. 13

Jun. 3, 1960 13

Kenneth L. Holaday, Judge;
Recess till 6-6-60—9:30 A.M.

Jun. 6, 1960 13

Kenneth L. Holaday, Judge; Partially tried; cont'd to Jun. 8, 1960 @ 9:30 A.M.

Jun. 8, 1960 13

Kenneth L. Holaday, Judge; Further trial; cont'd to Jun. 9, 1960 @ 9:30 A.M.

Jun. 9, 1960 13

Kenneth L. Holaday, Judge;
Verdict Guilty. Mo of deft cont'd to 6-22-60—9:30 for sent.
Bail up to stand

Jun. 22, 1960 13

Kenneth L. Holaday, Judge;
Deft makes oral motion for arrest of judgt., argued and denied (statute illegible) Deft makes oral mo for new trial

No. 114162

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIF., *Plaintiff*,

vs.

LAWRENCE ROBINSON, *Defendant*

Date:

Attorneys
Samuel McMorris

Bail
$500 + $25 PA [SET] on Appeal

6/22/60

$525.00 surety bond approved and filed.
(Natl Auto & Cas)—on appeal.

11 Jun. 22, 1960 13

Kenneth L. Holaday, Judge; (cont'd)
Imposition of sentence suspended & deft placed on prob for 2 yrs on following conditions

1—Serve next 90 days in County Jail
2—Take Nalline test at such time and at such places as may be directed by Prob. officer
3—Remain gainfully employed
4—Obey all laws
5—Comply with direction of Prob. officer and the Court

Defendant committed.
Bail ordered exonerated. Notice of Appeal filed. Bail on Appeal fixed at $500 + $25 PA. in lieu committment issual.
Defendant committed (County Jail)

(File endorsement omitted)

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

HON. KENNETH L. HOLADAY, JUDGE. (AND JURY) DIVISION NO. 13

No. 114162

Violation of Section 11721 of the Health and Safety Code, a Misdemeanor.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff*,

VS.

LAWRENCE ROBINSON, *Defendant*.

Reporter's Transcript of Proceedings

Monday, June 6, 1960
Wednesday, June 8, 1960

APPEARANCES:

For the People: SANFORD GAGE, Deputy City Attorney
For the Defendant: SAMUEL C. MCMORRIS

15 LOS ANGELES, CALIFORNIA, MONDAY, JUNE 6, 1960, 10:00 A. M.

THE COURT: The People versus Robinson.

MR. MCMORRIS: The defendant is ready, if the Court please.

MR. GAGE: The People are ready, Your Honor.

THE COURT: Mr. McMorris, we have been waiting for you since 9:30.

MR. MCMORRIS: I was up in Division 20, Your Honor. I was under the impression that Your Honor sent the case to Division 20. I must have misunderstood.

THE COURT: We called up there and they weren't able to locate you.

MR. MCMORRIS: I was probably in the hall conferring with my other client. I have been there since after 9:00.

THE COURT: Counsel, would you approach the bench for a moment, please.

(Counsel approach bench without the reporter.)

(The following proceedings were had in open court.)

THE COURT: You may call the jury, Mr. Clerk.

(Whereupon the jury was duly empaneled and sworn.)

THE COURT: Ladies and Gentlemen of the Jury, we are about to take a recess in this matter until 2:00 o'clock.

16 I admonish you that during the recess you shall not converse among yourselves nor with anyone else on any matter pertaining to this case nor to form or express an opinion thereon until the matter is finally submitted to you for decision.

I would like to have you step down out of the jury box, if you will, at this time, and if you wish to leave the courtroom, you may do so and return at 2:00 o'clock to this courtroom.

(Whereupon court was adjourned until 2:00 o'clock P. M., the same day.)

17 LOS ANGELES, CALIFORNIA, MONDAY, JUNE 6, 1960—3:00 P. M.

THE COURT: The jury is present.

Do you wish to make an opening statement, Mr. Gage?

MR. GAGE: No, Your Honor, we will waive opening statement.

THE COURT: Do you wish to make an opening statement, Mr. McMorris?

MR. MCMORRIS: Not at this time. May we reserve the right to make one at the beginning of our testimony?

THE COURT: Yes, you may reserve that.

MR. GAGE: Officer Brown.

LAWRENCE E. BROWN,

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.
THE WITNESS: Lawrence E. Brown.

DIRECT EXAMINATION

By MR. GAGE:

Q. What is your occupation, sir? A. Police Officer, City of Los Angeles, assigned to Wilshire Felony Unit.
18 Q. Felony Unit.
Do you use a squad car? A. A plain unmarked vehicle.

Q. And as such, did you have occasion to observe the defendant, Mr. Robinson? A. Yes, sir, I did.

Q. And when you observed him, that was about February 4 of 1960? A. Yes, sir, that is correct.

Q. Approximately what time was it that you observed the defendant? A. Approximately 9:00 P. M.

Q. Now, just before you actually observed him—that is, recognized him as an individual, did you see him in an automobile? A. Yes, sir, I did.

Q. And where did you first observe this automobile? A. I first observed a 1947 Nash, 4-door sedan, green in color, traveling southbound on Serrano Street from 12th Street.

Q. That would be from 12th Street.
What is the next street south to the main street south? A. 12th Place.
19 Q. That is, is that near Pico? A. Yes, sir, two blocks north.

Q. And when you observed the defendant, approximately —when you observed this automobile, approximately how fast was it traveling? A. I would judge it to be approximately 10 to 15 miles an hour.

Q. Do you know the speed limit in that location? A. Yes, sir. It is 25 miles an hour.

Q. Were there any other cars traveling north or southbound at this time? A. No, sir, there were not.

Q. You were coming in which direction? A. I was westbound on 12th Street.

Q. And when you noticed this automobile, did you turn so that you were traveling southbound? A. Yes, sir, I did.

Q. Now, did you notice anything unusual about the rear of the automobile itself? A. Yes, sir.

The vehicle had no rear license plate illumination. It made it impossible for us to see the license number of the car.

Q. You couldn't read the license number at that time? A. That is correct.

Q. Did you eventually pull up to this automobile?

20 A. Yes, sir, we did.

Q. And at that time did it stop? A. Well, the vehicle came to a stop at the intersection of Pico and Serrano—there is a boulevard stop sign there—and made a left turn eastbound onto Pico and stopped across the street.

Q. Did anybody alight from the automobile? A. Yes, sir.

Q. Was that the defendant, or somebody else? A. That was Charles Banks, the driver of the vehicle.

Q. Did you have occasion to observe him at the time? A. Yes, sir, I did.

Q. And was there anything unusual about his appearance? A. Well, he had his sleeves rolled up on his shirt above the elbow and I observed that he had, on the inside of his left arm right at the crook of the elbow, what appeared to be a fresh needle mark.

Q. Did you have some conversation with him? A. Yes, sir, I did.

Q. And after that, did you approach the automobile? A. At this time I placed him under arrest.

Q. I don't want to go into that unless it becomes

21 necessary, but did you eventually go to the automobile? A. I didn't go to the automobile myself.

Q. Did your partner? A. Yes, sir, he did.

Q. What was his name? A. Officer Wapato.

Q. Did the persons who were in the car then get out of it? A. Yes, sir, they did.

Q. And do you recall if the defendant was one of those persons? A. Yes, sir, he was.

Q. Where did he come from—what part of the car? A. As I recall it, it was from the passenger side in the front seat.

Q. Did you get close enough to the defendant to observe him? A. Yes, sir, I did.

Q. And when you observed the defendant, did you have occasion to examine his arms? A. Eventually, I did, yes.

Q. What did you notice about the appearance of his arms?

MR. MCMORRIS: At this time the defendant will object to any testimony regarding what was observed on
22 the defendant's arms, and we request to take the officer upon voir dire as to the reasonableness and the legality of the arrest.

THE COURT: The request is granted.

Ladies and Gentlemen of the Jury, the Court is about to grant you a 10 minute recess which I would like to have you spend outside the courtroom.

During this recess, I admonish you not to converse among yourselves nor with anyone else on any matter pertaining to this case, or express or form an opinion thereon until the matter is finally submitted to you for your decision.

(Whereupon the jury left the courtroom.)

(The following proceedings were had in open court outside the hearing of the jury.)

MR. GAGE: I wonder if at this time we should present the affirmative evidence on probable cause, Your Honor.

THE COURT: Yes, I had that in mind and I thank you for your suggestion, Mr. Gage.

The Court at this time will go into the matter of probable cause, or more correctly, perhaps, the matter of the legality of the search and seizure.

I think perhaps the fundamental question might be placed as to whether or not the officer had a search warrant at that time.

Do you wish to ask that question?

MR. GAGE: I will.

23 THE COURT: Of course, you will have the opportunity to cross examine this witness on probable cause.

DIRECT EXAMINATION (RESUMED)

By MR. GAGE:

Q. You did not have a search warrant for this arrest, did you, sir? A. No, sir, I did not.

Q. When you observed this automobile, I believe you indicated it was in the region of Serrano traveling southbound near 12th Street? A. Yes, sir.

Q. Was there anything that had occurred in the past that you had information on in relation to unlawful activities in this vicinity? A. Yes, sir.

MR. MCMORRIS: I will object, I think, to this particular question of what happens in the vicinity. That would certainly not bind anyone just driving through there.

THE COURT: It will be overruled at this time. I think that goes to the weight to be afforded it, Mr. McMorris, rather than to its admissibility.

The answer may remain.

I believe the answer was, "Yes," is that correct?

24 THE WITNESS: Yes, sir.

By MR. GAGE:

Q. Officer Brown, what had you information on in that connection? A. There had been numerous purse snatchers in that vicinity and other vicinities throughout Wilshire Division.

Q. In relation to these purse snatching activities, where had you received your information? A. I had received them via police radio, via daily occurrence sheets and through crime reports.

Q. And in the location where these purse snatchings had occurred, were there any occasions where they had occurred by the use of an automobile—that is, as distinguished from somebody just walking on the street? A. Yes, sir. There were many occasions where automobiles were used.

Q. Now, I believe you indicated the speed of the automobile was 10 or 15 miles an hour on that street? A. That is right. I would judge it to be approximately 10 or 15 miles an hour.

Q. Now, there was no illumination of the taillight—that is, of the license on the car? A. That is correct.

Q. When you stopped the automobile and the driver, the driver was the person who got out and came over to

25 you? A. Yes, sir, he was.

Q. Did you notice anything about his arms at that time? A. Yes, sir, I did.

Q. What did you notice?

THE COURT: I think he has already testified to that. He saw a fresh needle mark in the crook of his left arm.

By MR. GAGE:

Q. Did you ever speak to the driver at that time? A. Yes, sir, I did.

Q. Do you recall his name now? A. Charles Banks.

Q. And what did he say? A. He stated that he used narcotics and he had used a short time prior to the time that we stopped him. I don't recall the exact number of days that he stated.

Q. Now, after you made this observation, did Officer Wapato observe these marks and hear the conversation that you had with this first person—that is, before you went to the car?

MR. MCMORRIS: I think I will object to that as calling for a conclusion, Your Honor.

THE COURT: Sustained.

26 MR. GAGE: I have no further questions.

THE COURT: You may cross examine on the matter of the search and seizure.

MR. MCMORRIS: Yes, Your Honor.

CROSS EXAMINATION

By MR. MCMORRIS:

Q. Now, Officer, you mentioned something about purse snatching in this neighborhood; is that a fact? A. Yes, sir.

Q. As a matter of fact, purse snatching goes on over the whole of the jurisdiction of your route, doesn't it? A. Yes, sir, it does.

Q. That is right.

Over the whole Wilshire District there is a certain amount of purse snatching all the time? A. Yes.

Q. When you stopped these people, you didn't say anything to them about purse snatching, did you? A. No, sir, I didn't.

Q. And you saw no activity on the part of anyone in that car which could actually appear to be snatching a purse from anybody? A. No, sir.

Q. The actual reason why you stopped the car

27 then was just to see what you might find out that

might have been done by these people, wasn't it? A. No, sir.

Q. Was the only reason why you stopped the car the slowness of the speed of the vehicle? A. No, sir, it was not.

Q. You never said anything to them about driving too slowly, did you? A. I don't recall if I did or not.

Q. You said nothing to them about any lack of rear view illumination, either, did you? A. Yes, sir, I did.

Q. To whom did you say that to? A. To Charles Banks, the driver of the vehicle.

Q. This was an old car, of course, about 13 years old, wasn't it? A. 1947 Nash.

Q. And, incidentally, this was a cold evening, wasn't it? A. I don't recall if it was cold or not.

Q. It was in the month of February? A. Yes.

Q. About 9:00 o'clock at night? A. Yes, sir.

Q. And you state that Mr. Banks had on just a shirt with the sleeves rolled up? A. Yes, sir, he did.

28 Q. With a short-sleeved shirt, or were they rolled up? A. A long-sleeved shirt with the sleeve rolled up.

Q. What was the color of the shirt? A. I don't recall at this time.

Q. Was it a sport shirt or dress shirt? A. I don't recall that.

Q. He had a necktie, or lack of one? A. He didn't have a necktie on.

Q. Do you remember anything else about his clothing?

Mr. Gage: Objection on the ground the question is ambiguous, Your Honor.

The Court: It will be sustained.

Do you wish the question read back, Mr. McMorris?

Mr. McMorris: Yes, Your Honor.

The Court: It is vague and indefinite and uncertain.

Mr. McMorris: All right, Your Honor. I will attempt to rephrase it.

Q. Do you know what kind of pants he had on? A. What kind?

Q. Yes, the color and kind. A. As I recall, they were a light color. I couldn't tell you what kind they were.

29 Q. Did he have a jacket with him at all? A. I don't recall.

Q. Don't you know it to be a fact, Officer, that when he was booked, he had a jacket which was searched and then booked as part of his property? A. I don't recall.

Q. All right.

Now, you stopped him at a dark portion of the street, didn't you.? A. Pardon?

Q. You stopped him at a dark portion of the street? A. The portion of the street where we stopped him was not a dark portion, no.

Q. Was it a corner? A. It was across the street from a corner. Serrano Street deadends at Pico. At that location.

Q. Where was the nearest street light? A. The nearest street light, to my knowledge, would be across the street. However, I do believe there are street lights along Pico Boulevard. I couldn't say how far they were from the vehicle at the time we stopped him.

Q. Now, were you able to see these marks you say you saw on Banks' arms by the light of the street light?

30 A. No, sir, I was not.

Q. What did you see them with? A. My flashlight.

Q. Were you particularly looking for marks? A. I shined my light about his person. I look for anything. Not particularly marks, no.

Q. For anything you might find? A. Yes.

Q. And you happened to see the marks standing out there? A. That is correct.

Q. One mark or more? A. I saw one mark at my first observation.

Q. Of course.

Now, to refresh your recollection, isn't it a fact that Mr. Robinson was riding in the back seat of the car? A. He may have been.

Q. As a matter of fact, weren't there two couples in the car, in fact? A. Yes, sir. There were two men and two women.

Q. And it later turned out that one was the wife of Mr. Banks? A. Yes, sir.

Q. And one was the friend of Mr. Robinson?

31 A. Yes, sir, that is correct.

Q. Now, when you pulled the car over, did you order Mr. Banks out? A. No, sir, I did not.

Q. He walked out voluntarily? A. He did.

Q. And walked up to your vehicle? A. He met me between my vehicle and his vehicle.

Q. In the street between the vehicles? A. Yes, sir.

Q. Now, your reason for stopping him was, eventually, the lack of rear view illumination; is that right? A. And the fact that he was driving slowly on a dark, unlit street, yes.

Q. Did you see anybody walking along that street? A. No, sir, I didn't.

Q. Was this the only car you saw traveling on this particular location? A. Yes, sir, it was.

Q. Now, after discovering the mark on his arm, you then went back to the car and you ordered the other three occupants out, didn't you? A. No, I didn't.

Q. What happened after that? A. I placed him under arrest.

32 Q. You placed Banks under arrest? A. That is correct.

Q. And you put him in your vehicle; is that right? A. No, sir; that is not correct.

Q. What happened? A. I took him to the sidewalk.

Q. And then what next happened? A. In the meantime, my partner, Officer Wapato, had gotten the other three people in the vehicle outside.

Q. The next thing you observed as to Mr. Robinson, then, was that he was outside? A. That is correct.

Q. Now, then, did you and your partner, or either, order the two females and Mr. Robinson to line up against a building, or something, there? A. Yes. They lined up three abreast, abreast of each other across the front of the building.

Q. At that point you ordered Mr. Robinson to take off his jacket, didn't you? A. No, sir, I didn't.

Q. He had a jacket on, of course? A. Yes, he did.

Q. You couldn't see any marks on his arm? A. No, sir.

Q. Did you place Mr. Robinson under arrest at

33 that time? A. No, sir, I didn't.

Q. When was he placed under arrest? A. After I had questioned him.

Q. Now, before questioning him, you ran a search of him, didn't you? A. I cursorily searched him for offensive weapons, yes.

Q. And you found no such—A. Yes.

Q. And then you next searched him for narcotics, you or your fellow officer in your presence? A. No. That wasn't the next occurrence.

Next, I questioned him regarding his nervous condition.

Q. He appeared nervous to you? A. He certainly did, yes.

Q. What did he say about his nervous condition? A. He said he has been nervous all his life and he gets nervous when he talks to policemen.

Q. Then what happened in connection with Mr. Robinson? A. I asked him if he used narcotics.

He said, "Yes, I use narcotics."

Q. He told you that? A. He stated to me that he wasn't hooked. He stated to me that he hadn't used nar-
34 cotics in approximately two months. He stated then that his friends came by his house and he used their narcotics, their outfits; that he had never bought narcotics.

He then stated he hadn't used narcotics in two weeks.

Q. So at that point you asked to look at his arms; is that right? A. I did.

Q. And you ordered him to take off his coat? A. I did.

Q. And you ordered him to roll up his sleeves of his shirt? A. That is correct.

Q. And when he rolled up his sleeves, what did you see? A. I saw scar tissue and discoloration on the inside of his right arm, and I saw numerous fresh needle marks on the inside of his left arm and also a fresh scab.

Q. Prior to the time you ordered Mr. Robinson out of the vehicle, or he was ordered out by your fellow officer, you had not seen Mr. Robinson in violation of any law, felony, or misdemeanor, had you? A. No, sir, I had not.

Q. Now, how long after you first took Mr. Robinson out of the vehicle did you place him under arrest?
35 A. I can only guess at this one. I would say approximately 10 minutes.

Q. May it have been 20 minutes? A. I don't think so.

MR. MCMORRIS: I have no further questions of this witness.

MR. GAGE: I have a couple of questions.

I am sorry. I overlooked them previously.

REDIRECT EXAMINATION

By MR. GAGE:

Q. When you noticed that the defendant was nervous and perspiring, did you have occasion to examine his eyes or face, also? A. Yes, sir, I did.

Q. Did you notice anything unusual about the appearance of his eyes? A. His eyes were pinpointed and glassy.

Q. Did you examine them with a flashlight? A. Yes, sir, I did, in comparison with Officer Wapato's eyes.

MR. GAGE: I have no further questions.

MR. MCMORRIS: One or two in that connection since it was opened up, Your Honor. Something different.

36 RECROSS EXAMINATION

By MR. MCMORRIS:

Q. At what point did you look at the defendant's eyes with a flashlight? A. It was before I checked his arms. It was when I was interrogating and talking to him.

Q. Was this after he told you that he used narcotics; is that right? A. Yes, sir, that is correct.

Q. And, incidentally, before testifying here today, did you refresh your recollection by use of the police report? A. Yes, sir, I did.

MR. MCMORRIS: May I read that report, then, Your Honor?

THE COURT: You may.

MR. GAGE: May the record reflect that I am handing a copy of the arrest report to counsel.

THE COURT: It may so reflect.

MR. GAGE: Thank you.

(Pause in the proceedings.)

By MR. MCMORRIS:

Q. Officer, I would like to hand you——

MR. MCMORRIS: May I mark this report Defendant's A, Your Honor?

THE COURT: Not at this time.

37 MR. MCMORRIS: Very well.

THE COURT: At this time it is not permitted; however, it is without prejudice.

MR. MCMORRIS: I will ask the officer to read the arrest report, beginning 9 lines from the bottom of the report with the words, "Officer commanded above"—I will ask the officer to read, that then the rest of the report.

(Pause in the proceedings.)

THE COURT: It appears that the witness has read the indicated portion.

You may proceed.

MR. MCMORRIS: Yes, Your Honor.

Q. Calling your attention, Officer, to the arrest report that you have just read, I will ask you whether or not in that report you did not make this statement:

> "Officers commanded the above suspect and passengers, Norma Banks, 873 East Vernon, and Ruth Robinson, 1043 South Kingsley, to get out of the vehicle. As above suspect got out, officers observed that he was perspiring heavily and that he appeared extremely nervous. Officers also observed that his eyes were glassy and his pupils pinpointed. In
> 38 checking suspect's arms, officer discovered numerous fresh needle marks on the inside of his left arm and one scab approximately 3 inches below the crook of the elbow on the forearm. The suspect had scar tissue on his right arm.
>
> At that time suspect made the above statements and was placed under arrest."

Q. Did you make that statement? A. Yes, sir, I did.

Q. Now, according, then, to your previous statement, the suspect made the statements after looking at his arms; isn't that a fact?

MR. GAGE: Excuse me, just a minute.

I will object to the question as being ambiguous.

THE COURT: It will be sustained.

May I see your copy of the arrest report, Mr. Gage? Will you hand it to the clerk, please.

The objection is sustained.

(Document handed to Court.)

MR. MCMORRIS: I withdraw it because I think the answer already speaks for itself.

THE COURT: Let the record reflect the Court has read that portion of the arrest report which is entitled "Defendant's Statement," and which Mr. McMorris re-
39 ferred to in his questioning.

Are there any further questions on cross-examination?

MR. McMORRIS: No, Your Honor.

MR. GAGE: Nothing further, Your Honor.

THE COURT: You may step down.

Do you have any further evidence to present on the matter of search and seizure?

MR. GAGE: Excuse me just a moment.

Nothing further, Your Honor.

THE COURT: Do you wish to offer any evidence on the matter of search?

MR. McMORRIS: Yes, Your Honor.

THE COURT: Very well.

MR. McMORRIS: We will call Ruth Fairlur.

40 DEFENSE

RUTH FAIRLUR,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Ruth Fairlur.

DIRECT EXAMINATION

By MR. McMORRIS:

Q. What is your occupation? A. Telephone operator.

Q. The Pacific Telephone & Telegraph Company? A. Yes.

Q. Do you recall the occasion of the arrest of Mr. Robinson on this charge? A. Yes, I do.

Q. You were present in the car at the time of the arrest? A. Yes, I was.

Q. Now, just prior to the time that you were stopped by police officers, what were the occupants of the car doing?

What was the driver doing as far as driving was concerned and as far as the speed of the driving is concerned?

A. We were going slow, not noticeable.

41 Q. How fast were you going, if you recall? A. Well, I don't know exactly. We were talking and I wasn't paying any attention as to the mileage of the car.

Q. Now, do you recall what block you were in just before being stopped? A. Yes. We were between Pico and 12th Street on Serrano.

Q. At what point were you stopped? A. We were turning east on Pico when the driver, Banks, got out of the car and—he stopped the car and he got out, and the next thing I knew, I saw an officer—well, a man in plainclothes came and asked us to get out of the car.

Q. Was that a deadend street, if you know? A. Yes, sir, it cuts out at Pico.

Q. Can you turn to the right or left? A. Yes.

Q. Now, do you recall whether or not Mr. Banks had on a coat at the time of the stopping of the car? A. I don't remember. I believe he did. I am not sure.

Q. Now, did you see what took place between him and the officers before you got out of the car? A. He was back talking to them. He had gotten out on the driver's

42 side and went to the back, stepped on the curb, and he was talking to them.

Q. Did you see whether or not any of them were flashing a flashlight? A. No, I didn't notice that.

Q. Now, what next happened with reference to Mr. Robinson? A. Well, the officer in the back came. He asked us to get out of the car, and we got out of the car, and he put the flashlight and was looking all under the seats and the floor cover and in the car. And the officer with the light coat on asked us to stand beside the wall and he told us not to have any conversation, either of us to talk.

So he came back and he asked Banks to go—to stand over there, and he started talking to him. And after a while, he came back and talked—said a few words to us standing by the wall.

Q. At any time did he tell you why you were ordered from the car? A. No.

Q. Did he mention anything about purse snatching? A. No.

Q. Narcotics? A. No.

Q. Did he say anything about a lack of rear view
43 illumination? A. No.

Q. Had you had occasion to notice the rear of the car yourself? A. No.

Q. You hadn't noticed. All right.

Now, where were you riding in the car? A. I was riding in the rear on the left-hand side.

Q. Who was with you? A. Robinson—Lawrence.

Q. Who was in the front? A. The driver of the car was Charles Banks, and his wife, Norma.

Q. Was this a cold evening, by the way? A. Yes, it was quite chilly.

Q. Was this a dark portion of the street where you were stopped? A. Comparatively so, yes.

Q. How near was the nearest street light, if you recall? A. If I recall correctly, it was on the left-hand side of the street. It wasn't exactly on the corner.

Q. Incidentally, were you searched? A. Yes.

Q. How close were you to Mr. Robinson during the time of the conversation he had with the police officers?
44 A. I couldn't hear what they were saying.

Q. Did you at any time see him remove his coat? A. Yes.

MR. GAGE: Who is this?

By MR. MCMORRIS:

Q. Mr. Robinson remove his coat? A. Yes.

Q. How far were you from him at the time his coat was removed? A. I still couldn't hear what they were saying.

Q. But you could see him remove his coat? A. Yes.

Q. Did you see him roll up his sleeve? A. The officer—yes.

Q. Were you observing what happened to Mr. Robinson throughout this period? A. Yes.

Q. You were looking in the direction of him and the officer? A. Yes.

Q. At any time did you see an officer flash a light in his eyes? A. No.

Q. Now, how long from the time that you were first stopped was it before Mr. Robinson was ordered to
45 leave with the policemen? A. It was about 30 minutes.

Q. Now, you yourself were permitted to go on your way; is that right? A. Yes.

Q. What else transpired with reference to Robinson and the policemen during that 30 minute period? A. Well, the officer kept—they kept bringing him back and taking him away, you know.

Well, we were standing by the wall. The other girl and myself, we were standing by the wall, and Banks, he was standing there.

And the officer—I am not sure of his name—the one in the back, he came and got him and then he would bring him back or send him back, and the other one came and got him, and then they stood us, all three of us together, Walter, myself and Norma, and they talked about three minutes, or five minutes or so, as if to wonder if they were going to take him.

MR. GAGE: I move to strike the last statement as a conclusion of the witness, Your Honor.

THE COURT: Granted.

By MR. McMORRIS:

Q. How many times did you see the officers talking together before he made an arrest of Mr. Robinson? A. About three times.

46 Q. Between those periods, what would they do with reference to him? What would they do to Mr. Robinson, the defendant? A. Well, one time they asked him to pull his pants leg up.

Q. And did they flash a light at his pants leg? A. Yes, they did.

Q. Did they flash a light on his arms? A. I didn't see them do it.

Q. During any of the time when he was within your hearing, did you hear him say he used narcotics? A. No.

MR. McMORRIS: I have no further questions.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

By MR. GAGE:

Q. What is your name, please? A. Ruth Fairlur.

Q. What name did you give the officers that night? A. Fairlur.

Q. Do you know anybody by the name of Robinson? A. Yes, I do.

Q. Is that the name you also use? A. No, I don't.

Q. What is your home address? A. 1043 South Kingsley.

47 Q. Is it your testimony you didn't tell the officers your name was Ruth Robinson? A. No, I didn't.

Q. Was the name Robinson mentioned by you or by anybody else in your presence to the officers? A. Yes.

Q. Who mentioned it? A. The officer sitting in the back, in the back of the courtroom now.

Q. To whom did he mention that?

THE COURT: Excuse me just a moment.

We referred to the officer in the back on several occasions.

Is it where the two gentlemen are sitting together?

THE WITNESS: Yes.

THE COURT: And is it the one with the light or the darker coat on?

THE WITNESS: The dark coat.

THE COURT: Would you state your name, please?

A VOICE: Officer Wapato, W-a-p-a-t-o.

By MR. GAGE:

Q. How did that name come up? A. He asked me to take the contents out of my purse, and he asked me if I knew Robinson, and I said I did.

48 He asked me where we were going.

I told him we were going to cash my check.

Q. A pay check of some type? A. Yes.

Q. And how did the name Robinson come into the conversation? A. When he asked me if I knew Robinson.

Q. Did you have some identification that had the name Robinson? A. No, I don't.

Q. On that occasion, did you? A. No.

Q. Did you have some card with the name Robinson on it? A. No.

Q. Do you know why the officer mentioned that name?

MR. MCMORRIS: I will object to that, Your Honor. It clearly calls for a conclusion.

THE COURT: Sustained.

By MR. GAGE:

Q. Which officer had the flashlight? A. The officer in the——

Q. Wapato? A. No, the other one.

49 Q. Brown? A. Yes.

Q. And you saw him flash it on Mr. Robinson's arm and leg? A. I didn't see him flash it on his arms. I saw him flash it on his leg.

Q. Did you see the light lighted before that time? A. Not on Robinson, I didn't.

Q. Did you see the flashlight itself lighted? A. Yes.

Q. And do you know where it was flashed previous to that time, if any place? A. It was flashed on Charles Banks.

Q. How long have you known Mr. Robinson? A. Three years.

Q. How long? A. Three years.

Q. You might consider yourself his girl friend?

THE COURT: Well—

MR. GAGE: Strike the question, then, Your Honor.

THE COURT: That calls for a conclusion.

You may reframe it if you wish.

MR. GAGE: Very well.

Q. Do you go out with him socially? A. Sometimes, I do.

Q. About how often during the last three years?

50 A. Well, I can't answer it like that. I can't answer the question like that.

Q. Well, why is that? A. Because I have been working for the Telephone Company two years. Now, I don't go out very often because I don't have time to do my work if I go out.

Previous to that, we used to date three times a week, maybe more, maybe less.

Q. Well, you go out with him most of the time when you do go out socially; isn't that true?

MR. MCMORRIS: Objection. That is not relevant.
THE COURT: Sustained.

By MR. GAGE:

Q. Now, was it your testimony—let me ask you this question directly: Could you hear the conversation between Mr. Robinson and the police officers? A. No, I couldn't.

Q. You couldn't hear any of it? A. No.

Q. Could you hear any of the conversation between the police officers and Mr. Banks? A. Only very little.

Q. What did you hear? A. He asked Mr. Banks where was he going.

Q. What did he say? A. He said we were going
51 on Vernon, on the East side.

Q. Did he say why or where? A. No, he didn't.

Q. What was Mr. Banks wearing? A. He was wearing a pair of khaki pants, a tannish shirt, long sleeves. He had on a jacket, some sort of a windbreaker jacket.

Q. Did he have his sleeves rolled up on his shirt? A. I didn't see them rolled up.

Q. It is your testimony you don't know whether they were or they were not? A. If they were rolled up, they were rolled up under his coat, under his jacket.

Q. Did you ever see him take off his jacket? A. When the officer was looking at him, yes.

Q. Were his sleeves rolled up then? A. No.

MR. GAGE: I have no further questions.

MR. MCMORRIS: Just one or two, if I may.

REDIRECT EXAMINATION

By MR. MCMORRIS:

Q. Now, the officers, in fact, searched you; is that right? A. That is right.

52 Q. Did you show them the check? A. Yes, I did.

Q. What name did it have on the check?

THE COURT: It seems to me we are getting a little far afield here.

MR. MCMORRIS: There is some question whether or not she identified herself properly.

THE COURT: What difference does that make?

MR. MCMORRIS: None, really, except he went into it.

THE COURT: It will be sustained.

MR. MCMORRIS: I have no further questions.
MR. GAGE: Nothing further.
THE COURT: You may step down.
Is there any further evidence on the matter?
MR. MCMORRIS: Mr. Robinson, the defendant.

53 LAWRENCE ROBINSON,

defendant, called to the stand in his own behalf, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.
THE WITNESS: Lawrence Robinson.

DIRECT EXAMINATION

By MR. MCMORRIS:

Q. Mr. Robinson, calling your attention to the occasion of your arrest which led to this appearance today, what were you doing just before the stopping by the police officers? A. I was—you mean just before they——

Q. Pulled you over? A. We were going to get Miss Fairlur's check cashed, and I didn't realize the police was in back of us until Mr. Banks, he stopped the car and got out, and looking back, I seen the red light there.

Q. How long had you been driving? A. We hadn't been in the car only about 10 minutes.

Q. How far had you come in point of space? A. About five or six blocks.

Q. Were you driving slowly? A. I would say 20
54 miles an hour, 15 miles an hour, something like that.

Q. And, now, what first happened between the officers and the occupant of the car? A. Well, Mr. Banks, he got out of the car. He seen the red light. He stopped his car and he got out.

And I didn't pay any more attention until the officers come to the car and opened the back door where I was sitting. I was sitting in the back on the right-hand side, and he opened the door and ordered us out of the car.

Q. What did he say? A. We got out.

Q. What did the officer say? A. He told us to get out.

Q. Prior to this time, had you heard any conversation between the officers and Banks? A. No, I hadn't.

Q. Do you recall how Banks was dressed? A. Yes.

Q. How was he dressed? A. Well, he had on a pair of khakis, I believe, and a shirt and jacket.

Q. Was the jacket on at the time? A. Yes, it was.

Q. All right.

Did you see the officers flash a light on him, on
55 any portion of his body? A. No, not at that moment.

Q. Were you looking in their direction at that time?

MR. GAGE: Just a minute.

I will object on the ground there is no identification as to time. I think it is ambiguous.

THE COURT: Sustained.

By MR. McMORRIS:

Q. At the time that Banks first went back to the officers and to the time you were asked to get out of the car, did you observe what took place between Banks and the officers? A. No, I didn't.

Q. You weren't paying any attention then? A. No, I really wasn't. I just thought it was a routine thing.

Q. At any time did the officers say anything to you about stopping you for purse snatching? A. No.

Q. Or suspicion of purse snatching? A. No.

Q. Did they say anything in your hearing about the lack of rear view illumination on the car? A. No.

Q. Did you happen to have occasion to look at
56 the rear of the car? A. No, I didn't. I didn't.

Q. So you don't know whether or not there was— A. I don't know whether there was or not.

Q. Now, after you got out of the car, what was said by the officers to you? A. Well, they come over. And the officer in the back there—I can't pronounce his name—he come over. He is the one that got us out of the car, and he searched the car.

MR. GAGE: Officer Wapato?

THE WITNESS: Yeah, Officer Wapato.

He got us out of the car and over against the wall and he searched the car, and he come over and he didn't say anything to me. He was talking to Banks. And while they were talking to Banks, I seen him take his jacket off, and they placed him under arrest and put the handcuffs on

him. Then they come over to where I was standing and told me to take my jacket off, so I taken my jacket off. And he told me to roll my sleeves up, so I did that.

Then he—this officer in the back there—he went over and he talked to his partner, and then his partner come back where I was and he looked at my arms. Then they went off again. Both of them went off and they talked again. And then they come back and both of them
57 looked at my arms again, and they left and went back over to the car, and they talked among themselves, just the two of them, and they come back and arrested me.

By Mr. McMorris:

Q. How long from the time you were stopped was it before you were told you were under arrest? A. About 30 minutes.

Q. Now, at any time did you tell the officers, during this period that we have just testified about, you used narcotics? A. No, I didn't.

Q. Did you tell them that you used narcotics two months before? A. No.

Q. Or two weeks before? A. No.

Q. And was anything said about perspiration or nervousness? A. Yes, there was.

Q. What was done and said about that? A. He asked me why I was perspiring.

And I told him I was born like that; I did it all the time everytime I get the least bit upset. I don't have to be upset. I automatically perspire.

He said, "Ain't you a little nervous?"

And I said, "Yes, sir, I am a little nervous. I am
58 trying to figure out what this is all about."

Q. Did you say anything about being nervous when you are stopped by policemen? A. Not necessarily. I say when I get excited, things like this excite me.

Q. Was this a cold evening, by the way? A. Yes, sir. It was pretty chilly.

The Court: Excuse me just a moment.

Mr. Bailiff, would you bring the jury in.

(The jury returns to the courtroom.)

(The following proceedings were had in open court within the hearing of the jury.)

THE COURT: I don't believe you need to be seated in the jury box, Ladies and Gentlemen.

The recess will be extended until tomorrow morning at 9:30.

Bear in mind the admonition that I have heretofore given you about discussing the case among yourselves—not tomorrow morning. Tomorrow is a legal holiday. Wednesday morning at 9:30.

Bear in mind the admonition that I have heretofore given you. You are still on recess. Wednesday morning at 9:30.

(Whereupon the jury was recessed until Wednesday, June 8, 1960, at 9:30 A.M.)

(The following was had outside the hearing of the
59 jury.)

DIRECT EXAMINATION (Resumed)

By MR. MCMORRIS:

Q. At any time was a flashlight flashed in you eyes? A. No, it wasn't.

Q. At any time were you asked to stand next to one officer while a light was flashed in his eyes or yours? A. No.

Q. When was the first time you were informed that you were under arrest? A. About 30 minutes after I was stopped.

Q. And before that, had you been told why you were stopped? A. No.

MR. MCMORRIS: No further questions.

THE COURT: Cross examine.

CROSS-EXAMINATION

By MR. GAGE:

Q. Did either of the officers have a flashlight? A. Yes, sir.

Q. And do you recall which officer? A. Both of them.

Q. They both had flashlights? A. Yes.

Q. Did they have these flashlights lighted?
60 A. The time this officer in the back there used his flashlight was when he was searching the car.

Q. That is not my question.

Did each of them at least light their flashlight on one occasion? A. Sure.

Q. Was a light ever shined on you? A. Yes, sir.

Q. Where was it shined on you? A. On my arm and leg.

Q. You couldn't hear the conversation of the officers after they examined you and then went back and had some conversation, could you? A. No, sir.

Q. What did you tell the officer when he asked you why you were driving in that location? A. Why we were driving in that location?

Mr. McMorris: I will object, Your Honor. That assumes facts not in evidence.

The Court: Sustained.

By Mr. Gage:

Q. Didn't you tell the officer why you were in that vicinity? A. Sure, I told him.

Q. What did you tell them? A. I told him that Miss Fairlur lived over there and I was going to cash the
61 check.

Q. Did you tell him where you were going to cash the check? A. No, sir.

Q. How far were you from Miss Fairlur's house? A. About five blocks.

Q. You heard no conversation between the officers and Mr. Banks? A. No, sir.

At what time is that? During the time that we were—or after the arrest or before the arrest?

Q. Did you hear any conversation at all? A. After we was in the car, I heard some conversation.

Q. This was on the way to jail? A. Yeah.

Q. But you didn't hear any up to that time? A. No.

Q. Did you ever see the officers flash a light on his arm? A. Let me see. Yes, sir, I did.

Q. Did the officers ever ask you any questions about narcotics? A. You mean at what time?

Q. At any time. A. Before or after the arrest?
62 Q. At any time before you were at the Station.
A. When we was in the car.

Q. While you were on the way to the Station? A. Yes, sir.

Q. They never asked you anything before that? A. No, sir. All they did was look at my arms.

Q. When they looked at your arm, this was before you were in the car, wasn't it? A. Yes, sir.

Q. They never asked you anything about any marks on your arm? A. No, sir.

Q. They never asked you about narcotics? A. No, sir. They didn't say a word to me.

Q. Did you say anything to them? A. No, sir. I just stood there. That is all.

MR. GAGE: I have no further questions.

THE COURT: You may step down.

Is there any further evidence on the matter of search?

MR. MCMORRIS: No, Your Honor, no further evidence.

I would like to submit to the court, though, that this was certainly——

MR. GAGE: Excuse me just one moment.

THE COURT: Is there any rebuttal, Mr. Gage?

MR. GAGE: No, Your Honor.

63 I am concerned about one point. I am sure the Court has had much more experience in this respect than I have, but may I bring it to the Court's——

THE COURT: Well, gentlemen, I must recess in five minutes, and it isn't often that I announce my conclusion prior to listening to arguments, but if you do not mind, I would like to evaluate this matter of the legality of the search and then, if you wish to be heard in the matter of argument, I will be pleased to hear you Wednesday morning.

MR. GAGE: This has nothing to do with argument. May I just take a moment of the Court's time?

THE COURT: Yes.

MR. GAGE: This just has to do with the question—I didn't know whether the fact would be in dispute in this case, and I don't know whether it is a question for the Court entirely or whether the defendant has to waive a jury trial in order to present these facts to the Court. I am ignorant in that respect.

THE COURT: I think I have heretofore advised you, Mr. Gage, that it is my opinion of the law and I think it is well

settled that the question of the legality of the search or seizure, or both, as the case may be, is a question of law which has to be determined by the Court outside the presence of the jury.

MR. GAGE: Thank you, sir. I have nothing further.

64 THE COURT: That is the course we have been embarked on for the last several witnesses, and we are now at the point where the Court has to rule whether or not there was a valid search in this case.

If the Court rules that there is, then the jury will be returned and the People will continue to present their case from the point where you left off.

If the Court rules that was an invalid search, why, then, of course, you will be precluded from presenting any evidence in connection with the search, which, in effect, will preclude the People from offering any evidence of the defendant's guilt on this charge as I see it.

MR. GAGE: I have nothing further at this time.

CONCLUSION OF COURT ON VALIDITY OF SEARCH

THE COURT: Now, having in mind that this is a tentative conclusion, gentlemen, and you may consider it over tomorrow's holiday, and if you wish to argue it on Wednesday, I will be pleased to hear you at 9:30.

It appears to me that there was and is reasonable cause for the search of the defendant Robinson in this matter.

Now, there has been considerable testimony as to the search of Mr. Banks, and it appears to me, even assuming that the search perhaps as to Mr. Banks was illegal, I believe he is the only one who can raise that objection, so the results of that search I do not believe perhaps

65 would be available to the defendant Robinson here, assuming that it was illegal, but even so, from the evidence that has been presented here, the Court will find that the search of Mr. Banks was a lawful search.

Now, the officers being in the neighborhood because of purse snatching appears to me not to justify any course of action that was pursued here, but the only testimony that we have from the People, even though they testify that purse snatching was done from automobiles, and Mr. Banks, in which Mr. Robinson was a passenger, was moving at a very slow rate of speed.

The only testimony presented by the People was that there were no other cars on the street, and it is singularly absent on the question of whether or not there were any pedestrians on the street.

Of course, the Court is aware that purse snatching is the snatching of a purse from a pedestrian or from some individual, perhaps in a car, but if there were no cars in which people could have purses, and there is no evidence here that there were people on the street that could have purses, then, of course, it doesn't appear that this car or the occupants thereof were about to do any purse snatching because there were no purses to be snatched.

I think, however, that the absence of the light as required by law to illuminate the rear license plate is sufficient
66 provocation upon which to stop the automobile and to question the driver. And the driver, which is undisputed, gets voluntarily out of the automobile after he had been stopped.

Now, then, of course, we have the question as to whether or not the testimony in connection with the discovery of the marks on Mr. Banks' arm were such as would justify the officers to order the other passengers in the car to alight and to line up against the wall, and that they proceed to search the car.

Now, of course, we have the testimony of the officer to the effect that Mr. Banks was in shirt sleeves, and that they observed needle marks on his arm. And while there has been no testimony here to the effect that this fresh needle mark was, in the opinion of an expert, created or caused by an injection of narcotics, it appears to me that it is a reasonable assumption that a police officer would be suspicious in that regard.

Now, of course, the testimony is in conflict. The defendant's witnesses have testified that Mr. Banks had on a long-sleeved shirt and had on a jacket, yet it is undisputed, too, by Mr. Robinson and also by Miss Fairlur that they were not able to hear all the conversation that occurred between Mr. Banks and the police officers.

And I, therefore, cannot conclude that he was unlawfully and illegally ordered to remove his jacket—that is,
67 Mr. Banks—or his shirt, or both, or roll up his sleeves on his shirt so that his arm might be inspected, which brings us to the proposition then whether

or not the officers, as I stated before, had probable cause to order the three passengers, the two ladies and Mr. Robinson, the defendant, out of the car.

It appears to me that they did have, having observed fresh needle marks on the arm of Mr. Banks, the driver. It appears to me that they would perhaps have been derelict in their duty if they had not ordered them out and searched the car.

Now, that, of course, brings us to the paramount proposition in this case as to whether or not the search of Mr. Robinson, the order that he bare his arm for inspection, was an illegal search. If it was, why, of course, then no testimony can be introduced on the subject. If it was not, then it can.

Now, Miss Fairlur again did not hear all of the conversation, if any, that went on between Mr. Robinson and the officers.

And the crux of the matter, as I view it, as to whether or not the officers had probable cause to order the defendant to bare his arm is contained in the testimony of Officer Brown wherein he said that Mr. Robinson told him that he had used narcotics; that he hadn't used it for two months;

that he wasn't hooked.

68 Then he said that he hadn't used it for two weeks.

He said he hadn't bought any narcotics; that he had used his friends' equipment, kit, and narcotics.

Now, of course, I have in mind that Mr. Robinson has denied all of this testimony; that he didn't make these statements. And I have in mind also that this is not in accord with what is set forth in the arrest report in that the arrest report, as pointed out by Mr. McMorris, points out that he was ordered to bare his arm and then he made these statements, which would seem to corroborate the defendant's statement. If he was ordered to show his arm and then made these statements, why, of course, the statements could not be used as any justification for ordering him to bare his arm.

I realize that in the preparation of these arrest reports that they cannot be always chronologically correct.

The officer has testified here. He has been cross-examined. I am disposed to believe that it is a misstatement in the arrest report, either as to composition or carelessness in dictation, and I believe that the officer's recollection of

what occurred is more accurate than that related by Mr. Robinson as what did occur.

So we have this situation: We have the driver of a car with a fresh needle mark on his arm. We have Mr. Robinson, the defendant, stating that he had used nar-
69 cotics; that he hadn't used them for two months. Then he changed that statement and said he hadn't used them for two weeks, and that he wasn't hooked, and that he hadn't ever bought any narcotics; he had always used his friends' kits.

As to whether or not that, in effect—and I believe that to be the situation—is reasonable cause for the search, namely, the ordering of the defendant to bare his arm, and I believe that it is, and I will be so disposed to rule in that manner unless persuaded to the contrary on Monday morning at 9:30—I mean Wednesday morning at 9:30.

This matter will stand recessed until that time.

(Whereupon court was adjourned until Wednesday, June 8, 1960, at 9:30 o'clock A.M., Tuesday, June 7, 1960, being a legal holiday.)

70 Los Angeles, California, Wednesday, June 8, 1960, 9:30 A.M.

(Following was had out of the presence of the jury.)

The Court: I take it you wish to argue the matter of probable cause for the search.

Mr. McMorris: Yes, Your Honor.

The Court: I take it you waive your opening argument.

Mr. Gage: Yes, I do. I want to apologize to the court for raising the question which I raised Monday. I had misread a case just that morning. I am sorry; I did not mean to take the additional time for that.

Apparently, the case was subsequently overruled, and I was confused, so at this time, we waive any argument on the issue of probable cause.

The Court: I will hear you on the pending matter.

Argument of Mr. McMorris on Validity of Search

Mr. McMorris: It seems that in this particular case we have to consider both the credibility of all the parties in-

volved, including the police officer under the circumstances of this particular situation; and secondly, the reasonableness of the various versions of the facts that happened.

Sometimes simply common sense or reasonableness may indicate that one position is inherently unbelievable and, hence, the other one should be adopted, especially in
71 view of certain rules, like the circumstantial evidence rule, and the rule that all admissions are to be viewed with extreme caution.

The Cahan case was intended to protect people in their person and their homes and their possessions from unreasonable search or arrest.

It is being greatly undermined by fitting the circumstances to suit the changes in the law. For instance, immediately after the Cahan decision, we had to have the confidential informer. The Court said, "Now we must name the confidential informant."

It seems to me that the type of arrest the Cahan case was to prevent was given a different version of how the arrest took place.

Previously, the officers said that they peeked in the door. Now they say that we have a confidential informer, and now they say that we have either admission or voluntary consent to search.

The courts, I think, are going to come to a new rule that such consent to search and such admissions in connection with probable cause are to be viewed with extreme caution.

I have recently written a letter to Mr. O'Connor, suggesting the Texas Rule for California. The Texas Rule, following the English practice, which requires any arrestee be told he need not make statements not to his ine-
72 ests and anything he says will be held against him. The Texas Rule also provides any waiver of that right must be in writing.

I point out these things as background matter to my basic argument here that there is no probable cause for this particular arrest of this particular man. I sympathize with the officers in the difficulty of the enforcement in the narcotic field. I think it is almost as impossible to enforce as prohibition. Eventually, in prohibition we had to legalize. Officers were simply unable to control the law.

It is a thing you have to get at people by another way. I think the same is true of narcotics. We are going to come to realize we have got to educate people early enough before they become addicts. We have got to get to the youngsters and give them real facts so their voluntary choice will be against narcotics.

We may have to legalize the use of it.

Enforcement, in the meantime, is simply failing.

They make more arrests all the time, and each time there are more to the arrests and a bigger quantity of contraband.

To let a bad case make a bad law will not solve that problem. There is much agitation for removal of constitutional protection, and that won't solve it.

73 Because of the impossibility, and because they have a job to do, I believe the officers tend to remember what they must remember and say what they must say to gain a conviction.

First, the very impossibility of their task; second, their resentment, I think, of the Cahan type of a rule which they think justifies fighting in any way they can to win; and third, since they have, in fact, obtained a guilty person, they feel almost that this is a dirty business, and if they perjure themselves a little bit or forget or remember what they should, then it is justified by the fact that this is, in fact, a criminal.

Unfortunately, having made an arrest, it is always a strong compulsion to try to justify it.

Coming, then, to the facts of this case as to where I think it is unreasonable that this arrest was made for the reasons that they say, first of all, these officers were not traffic officers and not in a traffic car and not dressed in uniform. We have a provision in the Penal Code which was intended to govern traffic arrests which says that every traffic officer shall wear full distinctive uniform and be in a car distinctly marked.

These men, as I recall, were either felony or narcotic officers, and they were out looking for felonies. It has been said that a person may not use a misdemeanor arrest as a protection for a felony search.

74 They had no reason to arrest for a felony at the original stopping. The conceivable arrest was for

the traffic violation. The Vehicle Code also outlines procedure to be followed in traffic arrests, and these procedures do not permit of a general arrest or search.

The provision provides that an arresting officer prepare in triplicate an order to appear in court, and he is limited to that. It is my position that the Vehicle Code permits, at most, a limited arrest, not a general arrest with general interrogation as to where you are going or general search.

The officers were limited and they went beyond the limit.

A search of a taxicab cannot be justified on the grounds that the cab driver might be arrested for double parking since the search would have no relation to the traffic violation or be a reasonable incident to an arrest therefor.

That is People vs. Blodgett, 46 Cal. 2d. 114.

Likewise, in Vol. 44 Cal. Jur. 2d., it says that a search of an automobile in which suspects were riding when arrested for making an unlawful U-turn cannot be justified as an incident to the arrest where it bears no relation to the traffic violation or to a vagrancy charge on which the suspects were booked.

75 It is, therefore, my position that whenever police officers go beyond the limitations of a traffic arrest, they are on a frolic of their own.

Secondly, it is unreasonable to believe on the night of February that the man they gave the ticket to had narcotic marks, since they couldn't have seen any in a cursory glance. Our witnesses both said he had a jacket on, and it is a reasonable thing on a night in February. It is a thing people do if they are in their right mind.

When I first came here I was working and studying for the bar, and I would go to work at 3:00 in the afternoon and get off at 1:00 o'clock in the morning, and I would be shivering in my bones.

I suspect a person who has learned to live in California is going to wear a jacket at night, especially if he leaves the house at night.

We have the positive testimony that the man did have on a jacket, and he was ordered to roll up his sleeves. Next, we have to come to the question of whether or not Mr. Robinson complied, assuming the Court to take their view he had long sleeves. It is a California Rule—the Federal Rule is contrary—but the latest cases I have is that the

defendant could raise an objection, although he was not an occupier of the place invaded, as cited in People vs. Cloud, 140 Cal. 2d.

76 The courts have held, since our purpose is to prevent constitutional invasion, that a third party may object to invasion of another party's rights if it affects the incrimination of the third party. There are many cases on that. They are compiled in an excellent volume in the library.

Even going beyond that, let's assume that I am taking it step by step, that we don't accept our right to object to the unconstitutional violation of Mr. Banks.

Then we have three possible versions as to what happened in connection with Mr. Robinson.

Clearly, the mere presence with a user of narcotics is not sufficient of incriminating a second person. There are many cases on that. The mere presence of a defendant in another person's home would not justify his arrest and search unless the officer was justified in arresting such other person and reasonably mistook the defendant for him.

They have to show reasonable arrest of the first party and reasonable mistake as to the identity.

The mere presence with a person who could be reasonably arrested would not permit the arrest of a second person. The mere fact that I may smoke, doesn't make my wife smoke; and if I smoke marijuana, it doesn't make her smoke marijuana. These things don't spread as do a contagion or a disease. There are exceptions to this,

77 of course.

We have three possibilities as to what happened with reference to Mr. Robinson—that he very openly and voluntarily said, "Yes, I use narcotics. Come and search my arms."

This is their version, essentially, and only one of the three which is unreasonable.

The other two are these: One, that having ordered him to roll up his sleeves and having seen the marks, they then said, "Well, we have got you dead to rights. Come clean."

And I can see a reasonable person agreeing, "Yes, you have got the evidence. I do use it, but I haven't used for two weeks or two months."

This is reasonable to believe, and this would have meant search before admission.

The third possibility is that no admissions were made at all, and this is a version which the defendant took when he took the stand, which is a reasonable version.

It is not reasonable that anybody in his right mind would voluntarily inform about being a user, if not under the compulsion of arrest or interrogation.

We come to the question of the unreasonableness or alleged oral admissions, and if these admissions are made so readily upon arrest, it is questionable why then would a person defend and deny it.

78 Secondly, why don't they get it in writing if a person is so willing to co-operate.

There is another consideration. In the first place, the Court saw the arrest report which supported our version, and it is more likely that the officer's memory was clearer months and months ago when this happened than it would be now as to what happened; and months ago in February, he said that after the search he made these admissions. So, it is pretty reasonable to reject it now.

They had control of the record, and they should be bound by it. It is too late to be corrected now, and that is what has happened.

These men's job is to make arrests, and it is easy to confuse facts, especially of the two arrestees in this case. They could have mistaken what they did with reference to Mr. Banks as against Mr. Robinson.

On the other hand, as to Mr. Robinson, this is his first narcotic arrest, and it is obvious he obtained counsel because I have been appearing in court since immediately after the arrest. It is reasonable that he related facts to me and I took notes and we have been going over it. It is also reasonable to say I prepared my client that we would have a more clear version. I had to take notes, and we would have gone over them before trial, and our

79 memory of the things is more likely to be more clear. This doesn't happen every day.

One other thing which supports our version that there was a search without admission or before admission are the facts that they also arrested two women who were there and searched the one who took the stand.

There is no question that they didn't admit anything, and the fact they aren't narcotic users. They were permitted to go their way, at least the one was permitted to go.

This also bears out the fact that they made an arrest and then after the arrest saw what they thought showed narcotic addiction, and then if any admissions were made, they were made at that time; and now in order to justify the arrest, the admissions come before.

Finally, if we get to the point where we could accept the admissions at all, we must remember here the distinction between a felony and a misdemeanor arrest.

This man was arrested and is being tried for a misdemeanor. The rule of probable cause does not apply to a misdemeanor arrest, but applies to a felony arrest.

In other words, a misdemeanor must be made either upon a written complaint; or for a misdemeanor, it must be committed in the presence of the arresting officer.

Here, we have an admission, assuming we can accept their version. Here is a man, by their best version, saying, "I used narcotics two weeks ago. I injected heroin as a user two weeks ago."

This is not an admission of a present misdemeanor at all. Certainly, the admission would not show the commission in their presence and could not form the basis—the statement of a past misdemeanor cannot form the basis of a present arrest.

They first have to get a written complaint. From any standpoint, it seems to me that they had no right to arrest Mr. Robinson, however, good faith they may have had.

I think, in this case, they do not sustain a burden, and I don't think we should have to go on the stand to prove his innocence.

STATEMENT BY COURT OVERRULING OBJECTIONS TO SEARCH

THE COURT: I do not believe I wish to hear from you, Mr. Gage.

Your statement as to the difference in the application of a rule as distinguished between misdemeanors and felonies, in my opinion, is correct.

So that you may understand the Court's thinking in that respect, and a matter upon which I did not touch last Monday.

I had this in mind at the time, and I still do: A person who is addicted, in my opinion, is one who is addicted to, strongly disposed to, in this case, of course, if such be the matter, to narcotics.

81 Addiction is probably a continuing effect until a person ceases to become addicted to it. That is to say, a person who is an addict remains so until he ceases to be an addict.

Now, we have also testimony in this matter, while there has been no testimony that the defendant was under the influence—after a foundation having been laid as to the witness' ability as an expert, there has been testimony, nevertheless, that certain characteristics were present at the time of this arrest of Mr. Robinson; namely, that he was perspiring.

Of course, I take into consideration the fact that he explained that by saying he was nervous and he was always nervous when he was being stopped by police officers. He testified to this—that he became covered with perspiration or did have it to a certain extent.

There was also testimony to the effect that his eyes were pinpointed, and they were watery. Of course, those are characteristics which, I think, the Court can take judicial knowledge of, which are usually attributable to a person who is under the influence of narcotics, and also those factors can be attributable to other matters. A person might have a cold or flu, or something of that nature.

I doubt that a cold would pinpoint the eyes to the point where there was no reactions to light, but there are factors here which indicate to the Court that there was

82 reasonable cause to believe, first, that the defendant was addicted because of his inconsistent statements to the officers.

First, that he had an injection of heroin or a narcotic two months ago, and at a later time he said two weeks ago.

Further, it appears that there were some, if not several, characteristics present which would lead a reasonable person under the same circumstances to believe that he was then and there perhaps under the influence of a narcotic.

Although there is no expert testimony to the effect that he was, I think the Court may reasonably draw that inference.

The question, therefore, is: Is it reasonable to say that a reasonable person would conclude that there was probable cause of a misdemeanor being committed then and there in the presence of the officers? I believe there was.

First, that he was an addict in view of all the circumstances; second, that he was under the influence of a narcotic at that time.

Therefore, it appears to me that there did exist reasonable cause to believe that a misdemeanor was being committed in their presence at that time.

83 I don't intend to bore you gentlemen with a recitation of why my conclusions were as they were last Monday afternoon. You have argued the matter very ably and demonstrated a familiarity with the law which is very persuasive, but I am still disposed to believe there was reasonable cause in this matter.

I wish to refer only to one thing. While I did mention it last Friday afternoon, you did not mention it in your argument this morning.

I agree with the proposition that the fact there was no light illuminating the license plate in itself would not give the officers in this case, or in any other case, in my opinion, based on that fact alone, the right to order the occupants out of the car and proceed to subject them to a minute search as an examination of arms, legs, and so forth.

We have more in this case. We have the lack of the light illuminating the license plate, which, I think, certainly is justification, and a police officer would be derelict in his duty, regardless of what detail he was attached to unless on some urgent call, if he did not at least stop the motorist and say, "Your lights are out on your license plate," and perhaps give him a ticket.

In any event, there was reasonable cause and a duty to stop the automobile, in my opinion, which was done.

84 Then, we have a significant factor if the officers are to be believed in this respect, and I have indicated that I do believe them, and I think it is undisputed that Mr. Robinson testified when the car stopped that Mr. Banks got out of the car and went back to the officers. That is his testimony. That is the officer's testimony. That the officers, who had a flashlight in their possession, then

and there played it on Mr. Banks, saw a fresh needle mark upon the arm of Mr. Banks, which changed the entire picture then from one of a mere motor vehicle violation to one of a different significance.

It was upon that factor which I then reasoned to the conclusion that the officer had a right to make a search of the car and to order the defendant in this case, Mr. Robinson, and Miss Farley and the other lady, out of the car.

Of course, that still was not justification, as you very aptly pointed the fact out, that a person under the blanket circumstance of being present with a person who is an addict, that does not justify his being searched.

We then proceed to the matter which you have discussed and which I have discussed as to whether or not the officers had reasonable cause to direct the defendant in this case to submit to a search of his person.

Of course, it is a question of credibility. You have argued the matter. I have heretofore analyzed it,
85 and I believe that my original analysis is correct—that the officer's testimony is correct.

I believe in view of Mr. Robinson's statements and the other factors in this case, there was reasonable cause to order that he bare his arm, that his person be searched in the manner which was done in this case.

For the reasons stated, the objection will be overruled.

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91 The pending question to which the Court overruled the objection was to the effect that: Did you make an examination of the defendant's arm, or words to that effect.

Mr. Balliff, will you bring the jury in.

(The folowing was had in the presence of the jury.)

THE COURT: Mr. Brown, resume the stand, please. The jury is present. You may proceed.

LAWRENCE E. BROWN,

was previously sworn, resumed the stand as a witness for the People, and testified as follows:

DIRECT EXAMINATION (Resumed)

By MR. GAGE:

Q. Officer Brown, did you examine the defendant's arm? A. Yes, I did.

92 Q. At the time you examined it, where was the defendant? A. Standing on the sidewalk adjacent to the parked vehicle.

Q. Did you have a flashlight available to you? A. Yes, sir, I did.

Q. Did you examine the arm, that is, after it was bared? A. Yes, sir, I did.

Q. What did you notice about the defendant's arm, if anything? A. On the defendant's right arm, he had scar tissue and discoloration on the inside of the right arm. On the left arm, he had what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow on the inside of the arm.

Q. I don't recall whether I previously asked you, due to the passage of time, had you had some conversation with the defendant in relation to whether or not he used narcotics? A. Yes, I did.

Q. What statements did the defendant make to you? A. He stated to me that he did use narcotics, but that he hadn't used narcotics in approximately two months. He stated——

93 MR. MCMORRIS: At which time we object to these alleged admissions in that the corpus delicti of the crime has not been established.

THE COURT: It will be sustained, unless you wish to qualify this witness as an expert.

MR. GAGE: I would rather have the expert's testimony and recall this witness later.

THE COURT: Very well. You may step down.

(The witness left the stand.)

MR. GAGE: May I at this time call the next witness and put Officer Brown back after that time?

THE COURT: Yes, you may.

THEODORE M. LINDQUIST,

was called as a witness by the People, having been first duly sworn, testified as follows:

THE CLERK: State your name, please.
THE WITNESS: Theodore M. Lindquist.

DIRECT EXAMINATION

By MR. GAGE:

Q. State your occupation and assignment. A. Police officer for the City of Los Angeles, attached to the Narcotic Division.

Q. How long have you been attached to that par-
94 ticular division? A. Going on eleven years.

Q. What training or background do you have in the investigation of narcotics and addicts thereto? A. When I first entered the division, I was teamed with more experienced members, principally the registered nurse by the name of Ellen LePage.

At that time we worked together for approximately a year, and she taught me the fundamentals of looking at an addict, looking at the resulting marks from the injection of hypodermic needles, the resulting scar tissue and discoloration.

In connection with that, I attended the University of Southern California Law Enforcement School where I took the subject of Narcotics, Narcotic Addiction, and Abnormal Psychology. Various pamphlets issued by the United States Government were read in connection with addiction, books on the subject matter were read, lectures regarding narcotic addiction were attended by men working in that particular field, and all of this matter was put to practice use in the connection with the interviewed addicts that I came in contact with, and they have numbered well into the thousands.

Q. Have you seen addicts in various stages and conditions of addiction? A. I have.

Q. Have you seen persons who have merely taken
95 narcotics, that is, used them, who perhaps were not addicted? A. I have.

Q. Have you had occasion to observe persons in the field, or under what circumstances have you seen persons

so addicted? A. I have made arrests where the hypodermic needle was withdrawn from the vein at the moment we entered the room and the person was under the influence of narcotics following the arrest, and have followed through, watching the person within a limited period of time as to the reactions thereafter.

I have observed people under the influence to various degrees immediately following the arrest, and also have observed them at a later date when they were no longer under the influence.

Q. Is there anything distinctive about the type of injections made by addicts as opposed to injections made by a doctor, for example? A. Yes.

Q. What differences are there, generally? A. In general, there is an ineptness in handling the paraphernalia used, principally a hypodermic needle and a medicine dropper, in place of the medical syringe; the lack of sterility follows throughout. There is no sterilized equip-
96 ment, no swabbing of the area before the injection was made with a disinfectant, such as alcohol, and it results in scabbing that remains on the arm for a period of time.

Q. Approximately how long do these scabs remain. A. These scabs remain, depending largely upon the cleanliness habits of the individual using narcotics. If their cleanliness habits are poor, scabs remain for a longer period of time, up to 20 days. If their cleanliness habits are very good, then they may disappear within a short period of time, as much as ten days.

Q. Did you have occasion to examine the defendant in this case, Mr. Robinson? A. I did.

Q. Approximately where and when did you examine the defendant? A. The defendant was examined on the 5th day of February, 1960, at approximately 10:15 a. m. at the Central Jail, Felony Section.

Q. On that occasion, did you examine his arms? A. I did.

Q. What, generally, did you observe in connection with him arms?

MR. MCMORRIS: I interpose the same objection. I do not feel the officer is sufficient qualified to testify as an expert.

THE COURT: Overruled.

97 Q. What, generally, did you note about his arms at that time? A. In the area of the inner right elbow, I found two scabs. These scabs were over a vein. In the area of the inner left elbow, there was an area of discoloration and scabbing over a vein bearing five scabs.

Further down the forearm, approaching the wrist and following the vein coursing toward the outer side from the inner side to the outer side of the arm, there was the presence of multi discoloration.

MR. GAGE: May the record show I have previously handed three photographs to counsel and to the defendant to examine, and I would like to approach the witness stand.

THE COURT: The record may so reflect.

Q. I show you, Officer Lundquist, a photograph which purports to be a picture of the right arm of Mr. Robinson, dated February 4, 1960, and ask you if that is approximately the appearance of the defendant's arm on the morning of the 5th when you made an examination of the right arm? A. Yes. It appears to be the way it appeared to me that day with the exception of certain things. I am testifying as to what I saw on the man's arms. I am not an expert in photography. Consequently, I cannot say that certain things were present that appear on the arms that were present the following day or vice versa.

98 Some things could appear in the photograph that did not appear on the man's arms the following day.

Q. In connection with your recollection of the condition of his arm, does this reflect the marks that you indicated you had observed there? A. I see points on this photograph that indicate to me the same location that I observed these two scabs, yes.

Q. Would you be able to circle or mark those scabs for us, or their prolongation?

THE COURT: Do you wish to step up to the witness?

MR. MCMORRIS: Yes.

A. I an circling an area where there are two small dots appearing in the photograph as the site where I saw the two scabs on the inner elbow over a vein.

MR. GAGE: May this be marked as Exhibit 1, People's Exhibit 1 for identification?

THE COURT: People's 1 for identification. Turn it over on the back and mark it "1".

Q. I show you People's Exhibit, the photograph, purporting to be the left arm of Mr. Robinson dated also February 4, 1960, and ask you if you have seen this, or if this approximately represents the condition of the defendant's arm on the occasion that you examined him the next morning? A. Yes.

99 MR. GAGE: May we mark this as People's Exhibit 2?

THE COURT: So ordered.

Q. Could you illustrate by the circle the approximate location of the marks or the scabs that you observed on that arm on the morning that you made an examination of the defendant? A. That is an area of discoloration within this circle and within the area of discoloration are the five scabs I made reference to.

Q. Is that the area also of scar tissue that you previously described, or is there another area for that? A. I believe the photographs do not extend far enough down the arm to show the area of the multi-discoloration that I made reference to.

MR. GAGE: May I mark the third photograph, which also purports to be the left arm of the defendant, as People's Exhibit 3 for identification.

THE COURT: So ordered.

Q. The photograph, People's 3, purports also to be the defendant's left arm of approximately the date, the same date, February 4, 1960. However, it has a circle that appears to have been drawn on the arm, and is now represented in the photograph. Is this also an approximate representation of the defendant's left arm as you

100 examined it on the next day? A. Yes. The inner elbow area is exposed, but the greater part of the forearm is exposed.

Q. This is a somewhat different angle of the arm that is observable? A. Yes.

Q. Did you examine the defendant generally? A. Yes.

Q. Did you have a conversation with him? A. I did.

Q. Did you have a conversation with him in regard to whether or not he used narcotics? A. I did.

Q. What conversation did you have in that connection?

MR. MCMORRIS: I object to any conversation with the intent of purported admissions due to the fact of the corpus delicti of the crime as charged has not been proved.

THE COURT: Sustained.

MR. GAGE: May I be heard?

THE COURT: I think not. You lay the foundation for this witness as an expert.

Q. From your examination of these various scabs and various marks on the defendant's arm, did you form an opinion as to what caused those marks? A. I did.

101 Q. What was your opinion? A. In my opinion, these marks and the discoloration were the result of the injection of hypodermic needles into the tissue into the vein that was not sterile.

Q. From your examination of the nature of the marks and scabs of various discoloration, have you an opinion as to what was introduced into the arm by the means of the hypodermic needle? A. I do.

Q. What is your opinion? A. In my opinion——

MR. MCMORRIS: I object to the question on the ground there is no—that it is calling for a conclusion and opinion of which this witness is not qualified under the facts presented.

THE COURT: Overruled.

A. That a narcotic was injected into the vein.

Q. Did you have a conversation with the defendant as to his use of drugs? A. I did.

Q. At the time this took place what did the defendant state to you? A. I asked the defendant——

MR. MCMORRIS: The same objection. No foundation for admissions.

THE COURT: Sustained.

102 Counsel, will you approach the bench.

(The following was had at the bench out of the hearing of the jury.)

THE COURT: As to one question. Unless we determine whether these marks are a hundred years old or five minutes old, how can you establish the fact that he is an addict?

MR. GAGE: Of course, the complaint——

THE COURT: Let us not argue about the matter.

MR. GAGE: If I may explain my position. The complaint is in three forms. He may show use of a narcotic as opposed to actual addiction.

THE COURT: All right. Let us stop right there. There is no testimony before this jury that he unlawfully used it. The burden does shift, but if it occurs ten years ago, the statute has run.

There is no testimony before the jury that he is under the influence.

MR. GAGE: We do not intend to rely on that at this time.

THE COURT: Well, with the question posed, it explains my reason for my ruling on the objection.

MR. GAGE: Thank you, sir.

(The following was had in open court.)

THE COURT: You may proceed.

Q. By MR. GAGE: In connection with the examina-
103 tion of the defendant's arm, did you form any opinion as to the length of time or the age of these various marks that you observed on the defendant's arm? A. I did.

Q. Relate that, please. A. Those scabs that appear on the inner right albow area were estimated to be approximately ten to fifteen days old. The scabbing appearing in the inner left area was estimated to be approximately three to ten days old.

Q. Three to ten? A. Correct.

Q. And is there a difference in the appearance of these marks and scabs with age? A. Yes.

Q. And generally, what did you notice in that connection? A. Originally, a scab is a pinkish-orange color, and as it grows older, the blood oxidizes and ages, becoming a different color.

Those scabs that were ten to fifteen days old were dark brown in appearance. They were raised from the tissue.

Those scabs that appear in the inner left elbow area varied in color from a pinkish-orange to that of a lighter brown, and were adhereing closely to the tissue, had
104 not raised as yet.

Q. You indicated you had some conversation with the defendant in connection with the use of drugs. Could you relate that conversation?

MR. MCMORRIS: The same objection. No corpus delicti of the crime.

THE COURT: Overruled.

A. I asked the defendant when he had first begun using narcotics, and he said it had been approximately four months ago.

I then asked him if he had ever vomited upon taking an injection, and he stated yes, that he had vomited after this first fix.

I then asked him if this vomiting had continued following the injection of a narcotic, and he stated that he still vomited if he had eaten beforehand.

I asked him how much he was using, and he said he had started using cottons given to him about three or four times a week.

I asked him if he had used anything other than cottons, and he stated he had started using powder about two months ago.

I asked him how much he used, and he stated, "Two or three of us use an eight-dollar bag."

I asked him when he had his last injection or fix, and he stated his last fix had been on Wednesday night.

105 I asked him if he had split the bag, and he said, "A friend and I split the eight-dollar bag."

I asked where they had been, and he said they had been in a gas station at 54th and Central Avenue.

I asked him if this had been heroin, and he said that it was heroin. That was the extent of the conversation.

Q. This indication that the fix was at 54th and Central, was that indicated to be in Los Angeles? A. Yes.

Q. The statement the defendant made in connection with the use of drugs was made voluntarily without any promise or threats made to the defendant? A. They were.

Q. Would you describe what is meant by the use of a cotton. A. A cotton is used to strain the impurities from the solution. A small piece of it is placed in the receptacle, generally a bottle cap or teaspoon, and the fluid is drawn through it into the medicine dripper. After the cotton dries, there are still—it has been saturated with heroin solution. After it has been dried, it can be re-saturated, and that liquid is used. If it hasn't dried, it can be

squeezed, and the fluid left in the saturated cotton can be injected.

106 Q. What is the indication of using powder?

MR. MCMORRIS: There is no evidence of any use of powder in this case.

THE COURT: Sustained.

MR. GAGE: I believe there was an admission.

THE COURT: The ruling will stand.

MR. GAGE: Perhaps I misunderstood.

Q. Did the defendant say anything about the use of powder?

MR. MCMORRIS: Object to that and will ask that the previous testimony as to powder be stricken.

THE COURT: Overruled. You may answer the question.

A. Yes. He was asked if he was using a powder and he said that he was. He had.

Q. What does "a powder" refer to? A. This is the powder that is originally purchased, and then put into solution and used.

Q. In other words, before the drug can be injected, it has to be put into a liquor form? A. Yes.

MR. MCMORRIS: Object to the leading form of the question.

THE COURT: Overruled. The answer may stand.

Q. From your experience and your background in this field, can you estimate what quantities are referred to by "an eight-dollar buy" or "an eight-dollar bag"?

107 A. Yes.

Q. What does that represent? A. It is approximately three grains.

Q. Is there some way that you can relate that into a more understandable term to us? A. Yes. The small capsule referred as a number 5 capsule is approximately five-sixteenths of an inch long, and perhaps an eighth of an inch to three-sixteenths of an inch in diameter. It contains in weight approximately one grain of material when the material is quinine or heroin and its adulterant.

Q. When the defendant indicated that he had had his last fix, did he tell you whether it had been the Wednesday just previous to the day that you had examined him or a week previous to that? A. It was the previous Wednesday.

MR. GAGE: I have no further questions.

LAWRENCE ROBINSON

was previously duly sworn, resumed the stand and testified in his own behalf as follows:

DIRECT EXAMINATION (Resumed)

By MR. MCMORRIS:

Q. You recall being arrested for the offense for which you are tried? A. Yes, sir.

Q. On the night of that arrest, were you under the influence of narcotics? A. No, sir.

Q. At any time prior to that arrest, had you used narcotics? A. No, sir.

Q. Did you tell anyone at the time of the arrest, any officers, that you did use narcotics? A. No, sir.

Q. Did you state to any office that you used nar-
116 cotics at a filling station at 54th and Central? A. No, sir.

Q. Do you know whether or not there is a filling station at 54th and Central? A. No, sir, I couldn't say for sure.

Q. Are you familiar with that area? A. No. I go through there sometimes. I live on the east side.

Q. I ask you to look at these photos of your arms. First, take this one. I will ask you to observe this and tell the jury whether or not that is, in fact, your arm as it appeared the night of the arrest? A. Yes, that is my arm.

Q. Is there anything on that arm that was a mark made by a needle? A. No, sir.

Q. Will you tell the jury, what, if anything, marks on this picture are? A. Well, when I was in service, I took some overseas shots and it gave me some kind of an allergy. I don't know. I was allergic to it, I guess, and from that time on, I have had marks all over my body similar.

Q. Do you have those marks on your face? A. Yes.

Q. I will ask you to walk before the jury and point out to them what marks you have in mind.

THE COURT: You may step to the jury rail, about
117 the center of it, if you will, please, and the jurors in the back row may stand up if they wish and look over the shoulders of the jurors in the front row.

I believe your question was for Mr. Robinson to point out such marks on his face to the panel, is that correct?

(Witness goes to the jury box.)

A. If the jury will notice, I have splotches, dark spots on my face here, and a fresh one just came up, and I have them on my back and on my arms.

Q. Would you roll up your sleeves and show the jury your arms.

(Witness complied.)

A. I have them all over my body.

Q. Will you tell the jury what, if any, marks appears on your arms? A. Here and here.

THE COURT: Would you like to describe them for the record, Mr. McMorris.

MR. McMORRIS: Yes, your Honor.

MR. GAGE: I would like to know what you are identifying.

MR. McMORRIS: Indicating three marks just above the elbow on the left arm.

MR. GAGE: Which appear to be moles. I will describe them after, if I might.

118 MR. McMORRIS: He is now pointing to less obvious marks on his forearm below the elbow.

A. I have them all over my body.

Q. Hold up the other arm.

(Witness complies.)

Q. Will you tell what this discoloration is in the armpit? A. That is the same as the others. They come and go. They get lighter and they get darker.

THE COURT: Let the record reflect the witness is indicating his right arm, and area between the shoulder and the elbow on the inside of the arm.

MR. McMORRIS: We refer to a mark toward his body at the same spot about four inches from the previous mark, and I will ask you if that is the same as the other marks?

A. Yes, it.

MR. McMORRIS: The same nature.

THE COURT: Overruled. The answer may remain.

Q. Didn't you tell them that you hadn't fixed in about two months? A. No, sir.

Q. Did you later make the statement that you had fixed about two weeks ago. A. No, sir.

Q. Never had any conversation with any officer about using the cotton from your buddies' outfit when they were through? A. No, sir.

Q. You went down to the jail after this arrest at Pico and Solano? A. Yes, sir.

Q. Who did you go with? A. The officers. I don't know their names. Sitting in the back there.

Q. How many of you were all together? A. Four of us.

Q. Did you make any statement to the officers in the car about the use of narcotics? A. No, sir.

123 Q. Were you interrogated at that time? A. I was asked. The officers asked—it was a fellow and myself.

Q. You mean Mr. Banks, the driver of your car? A. Yes.

Q. Did you make any statement at that time about the use of narcotics? A. No, sir.

Q. The next day you were examined by Officer Lundquist, were you not? A. I believe it was the next day, yes.

Q. And at that time did you tell him that you had had a fix about Wednesday? A. No.

Q. In other words, you have gotten several continuances in this case? A. Yes.

MR. MCMORRIS: Objected to. I cannot see the relevancy.

THE COURT: Overruled. The answer may remain.

Q. I believe you stated that these marks you get come and then they disappear? A. No, they don't disappear.

Q. They leave somewhat of a scar, or something? A. I wouldn't know whether you would call this scar or not. It wouldn't be a scar.

124 Q. Similar to the marks you have on your face? Or marks on your back? A. A dark mark, something like that.

Q. And directing your attention to People's Exhibit 1, to the portions not circled. Would you take a look at the photograph, please. There is one portion of the arm that is circled with ink, is that correct? A. Yes

Q. Other than that portion, there are many other marks on the arm there which are similar to what you have described today, is that true? A. Yes.

Q. In other words, near the top and near the bottom of the photograph and near the part that is circled, there are these indications that you have shown the jury today, is that true? A. Yes, sir.

Q. In People's 2, down near the bottom, this is a picture, I believe, of your left arm, this photograph? A. I couldn't tell you which arm.

Q. That appears to be the way your left arm looks, does it not? A. Yes, sir. I guess so.

Q. Down near the bottom on the left side, there is one of these large marks that you have described as
125 due to this condition, isn't that true? A. Yes, sir, there is a mark there.

Q. That is not the elbow I am referring to, not the circled part down near the bottom? A. Yes, there is a mark there.

Q. In People's Exhibit 3, this also shows—this shows another side or portion of your left arm, does it not? A. Yes, sir.

Q. And not referring to the part that is circled, but referring to other portions of the arm, there is a dark, large blemish of some type near that area, is there not? A. Yes.

Q. And you indicated these marks came from some condition you got while in the service? A. Yes.

Q. That was about four or five years ago, was it not, that you were in the service? A. I came out of the service in '57, about three years ago.

Q. Since that time, or least in connection with the marks on your body, you are not—it is not your claim that these marks are now presently caused by the injection of some needle? A. That is the way—yes, sir.

126 Q. When did you last have a needle injection into your arm? A. The last time I had a needle injection into may arm? It was when I gave blood for a friend of mine's auntie.

Q. When was that? A. That was in, if I am not mistaken, in '59.

MR. GAGE: I think it is relevant as to the type of person involved.

THE COURT: Overruled.

(The reporter read the last question.)

A. I did use the name "Robinson", but not in reference to myself.

Q. Did you bring up the name or the officers?

MR. McMORRIS: Object. It assumes a fact not in evidence.

THE COURT: Overruled on that ground. I do not see the materiality of that question. It will be sustained on that ground. You may reframe it.

Q. Did you or did you not use an alias to the officers that evening? A. No, I did not.

Q. By the way, do you live in an apartment building? A. Yes, I do.

Q. You live in the same apartment as Mr. Robinson? A. No, I don't.

131 Q. He lvies at 1043 Kingsley Drive, does he not? A. No, he doesn't.

Q. Isn't that the address he gave the officers? A. I didn't hear them ask him where he lived.

Q. He does not live at that address? A. No, sir, he doesn't.

Q. You couldn't hear any of the conversation between Mr. Robinson and the officers that night? A. No, sir, I couldn't.

Q. Was there some particular place you were going to cash this check? A. Well, it was—we had started to go to Venice and Western. Then we decided that—I had tried two places where I lived to get the check cash, but one place they didn't know me. The other place didn't have enough money, and the third place, well, when we decided to go over there, they said, "Maybe they don't know you, and they probably can't cash your check there."

Q. So then you were going over to the east side? A. Yes.

Q. To a particular place? A. Yes.

Q. What particular place? A. We were going to Joe's Grocery Store. It is a market.

Q. Who was going with you to the market?

132 A. The four of us.

Q. Where is it located, Joe's Grocery? A. It is on Griffith.

Q. What street is it near? A. I think—

Q. What is the cross street? A. I am not sure. It is between 32nd and 31st.

Q. Were you going to do some shopping there? A. Not particularly.

MR. MCMORRIS: I object to that. It is going pretty far afield.

THE COURT: The answer is in. Overruled. The answer may remain.

Q. Did you tell the officer you were going around 51st Street or 54th Street? A. No, I did not.

MR. MCMORRIS: Object to the question.

THE COURT: Overruled.

Q. Did either one of the officers have a flashlight when they stopped your car?

MR. MCMORRIS: I object. It is improper cross examination. We didn't go into search and seizure with this witness.

THE COURT: Overruled. You may answer the question.

(The reporter read the last question.)

A. Yes.

133 Q. Were either of these flashlight illuminated? A. Yes.

Q. Both of them? A. Yes.

Q. Was one of them shined on Mr. Robinson or on part of him, at least? A. No, not at that time.

Q. It was at one time, was it not? A. Yes.

Q. And that was at the scene? A. Yes.

Q. Do you recall how fast the car was traveling?

MR. MCMORRIS: Object to that. I wanted to go into this myself. It is not relevant on the point of addiction.

THE COURT: I don't believe it has to do with that, Mr. McMorris. Overruled. You asked the question as to what this witness was doing just prior to the time that the officers appeared on the scene, and that being the case, Mr. Gage has the right to hear the answer at that time.

MR. MCMORRIS: May I go into it on redirect?

THE COURT: Overruled.

(The reporter read the last question.)

THE COURT: We will take the morning recess of ten minutes.

I admonish the jury that during the recess you are not to converse among yourselves nor with anyone else on the matter of this case until the matter is finally submitted to you.

(Recess.)

THE COURT: You may proceed.

108 CROSS-EXAMINATION

By MR. McMORRIS:

Q. As an expert in the field of narcotics, you know the symptoms of heroin addiction, do you not? A. Yes, sir.

Q. And among those symptoms are those termed withdrawal symptoms? A. That is correct.

Q. And at no time did you witness any withdrawal symptoms in Mr. Robinson? A. No, I did not.

Q. As a matter of fact, he wasn't under the influence at the time you interviewed at all? A. No, he wasn't.

Q. So you saw no influence and no withdrawal? A. That is correct.

Q. You saw on his arms certain discolorations on the veins of each arm? A. On the inner left arm, I noticed the discoloration.

Q. As a matter of fact, did you observe the whole of Mr. Robinson's body, say, above the belt? A. You mean the nude torso?

Q. Yes. A. No, just his arms.

Then you don't—you don't know whether he has
109 all over his body certain discolorations similar to this? A. No, I do not.

Q. As an expert in the field, you also know there is a Nalline test that can determine conclusively the presence of narcotics? A. Within limitations.

Q. This test wasn't given to the defendant, was it? A. No.

Q. As to the freshest scars which you allege you saw, they were how old? A. Approximately three days.

Q. Did you say three to five? A. That three to five-day period was the varying period of time in which they could have been made.

Q. It might have been three to five days that there was an actual injection by your own determination? A. Yes, sir. The freshest, three days, and the oldest being five days.

Q. And you can look at these marks and estimate three to five days or six or seven by looking at the marks on a person's arm? A. Yes.

Q. Of a needle? A. Yes.

Can you, by looking at these marks, tell us whether
110 or not they could have been caused by a blood test?

A. Yes. The blood test, generally, doesn't leave a scabbing for any length of time. It will have a small scab that will disappear rapidly. The needle used is larger and results in a larger scab.

Q. Such scab might last for a day, though, a day or two? A. Oh, yes.

Q. Simply looking at the scars on a person's arm, if such has been left by a blood test, it would be—the swab would not last as long as one made by a heroin needle, in your opinion? A. That is correct.

Q. You didn't take these pictures yourself? A. No, I did not.

Q. You didn't see the pictures made of Mr. Robinson's arms at all? A. No, sir.

Q. As they were made? A. No, I did not.

Mr. McMorris: No further questions.

(The witness left the stand.)

Mr. Gage: I will recall Officer Brown to the stand.

111 LAWRENCE E. BROWN,

resumed the stand as a witness for the People, having been previously duly sworn, and testified further as follows:

Direct Examination (Resumed)

By Mr. Gage:

Q. Did you have a conversation with the defendant? A. Yes, I did.

Q. That was outside at the scene near the automobile? A. Yes, it was.

Q. What did the defendant tell you?

Mr. McMorris: I make a similar objection for the record.

THE COURT: Overruled.

A. The defendant stated to me that he had—that he did use narcotics, that he had not used narcotics for approximately two months prior to his arrest. He stated that he had never bought narcotics, but that he used narcotics which his friends gave him. He used the cottons.

He stated that his friends would come to his house, pick him up and then they would ride around in a car, and that he would fix in the car.

He then stated that he hadn't used narcotics in approximately two weeks.

112 Q. The first time he told you it was two months since he had last fixed? A. Yes, sir.

Q. Later he told you he had used it about two weeks. A. That is correct.

Q. Did you take the defendant to the police station or did you accompany him there? A. Yes, I did.

Q. Did you observe his arms being photographed? A. Yes, sir, I did.

Q. Where was he photographed? A. He was photographed at the Felony Section at the Central Jail.

Q. When was this? A. This was on February 4. It was a little bit after ten o'clock. I don't recall the exact time.

Q. On the same night you made the arrest of the defendant? A. Yes.

Q. Did you observe his arms at that time? A. Yes, I did.

Q. I wonder if you would be good enough to examine the three photographs which appear in front of you, People's 1, 2 and 3 for identification, and indicate whether or not they appear to be a fair representation of the con-

113 dition of the defendant's arms on the night you arrested him and observed his arms? A. Yes, sir, they do.

Q. You have examined these photographs? A. Yes, I have.

Q. And they appear to reflect the condition of the defendant's arms on that evening? A. Yes, sir.

MR. GAGE: At this time, we move to introduce these three photographs into evidence.

MR. MCMORRIS: Object on the same ground as the previous objection.

THE COURT: Overruled. They will be received in evidence

marked in the same manner they are marked for identification.

MR. GAGE: I have no further questions.

CROSS-EXAMINATION

By MR. McMORRIS:

Q. What detail were you assigned to on the night of the arrest. A. Wilshire Felony Squad.

Q. Does that squad specialize in narcotics. A. No.

Q. General felonies. A. Yes.

Q. Other than narcotics? A. Allf elonies.

114 Q. Narcotic addiction is not a felony.

MR. GAGE: Well—very well. Withdraw the objection. It is a legal conclusion for the Court. A. No, it is not.

MR. McMORRIS: I have no further questions.

(The witness left the stand.)

MR. GAGE: The People rest.

THE COURT: You may proceed.

MR. McMORRIS: I would like to make a motion at the bench.

(The following was had at the bench out of the hearing of the jury.)

MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

MR. McMORRIS: The motion is for the verdict of acquittal, a directed verdict for acquittal, as to each and all of the charges, that there is not sufficient evidence.

THE COURT: Do you wish to argue it?

MR. McMORRIS: Not at this time.

THE COURT: The motion for a directed verdict will be denied.

MR. McMORRIS: May I renew at the close of all the evidence and then argue because I might get some ideas.

THE COURT: Surely.

(The following was had in open court in the presence of the jury.)

115 MR. McMORRIS: I would like to call the defendant to the stand.

THE COURT: You have been sworn, so state your name again.

THE WITNESS: Lawrence Robinson.

I would like to have him reveal his back if the Court doesn't mind.

THE COURT: Yes, he may remove his shirt and his Tee-shirt.

(Witness complies.)

THE COURT: You may put your shirt and Tee-shirt on counsel table.

Q. I ask you to stand so the jury can view your back without describing it.

119 (Witness complied.)

THE COURT: Turn so the Court can see your back.

MR. GAGE: Could we allow Mr. Lundquist to make his observation of the defendant?

THE COURT: Yes, you may do so.

(Officer Lundquist examines the defendant.)

THE COURT: Officer Lundquist, do you wish to observe the back of the defendant?

OFFICER LUNDQUIST: I have already done so.

THE COURT: Let the record indicate that Officer Lundquist has observed the arms of the defendant.

MR. MCMORRIS: You may put your shirt back on and resume the witness stand.

(Witness resumes the witness stand.)

Q. Those marks were occasioned from an injection of overseas shots in the arm? A. Yes, sir.

Q. Do those marks come and go or remain static? A. They remain that way. They get darker and they get lighter, but they stay and fresh ones will come up. When they first started, they first started on my body and now it comes up on my face. I went to the doctor and he doesn't know what to do.

Q. Do you know what causes to get them darker or lighter? A. No.

120 Q. I ask you to look at People's Exhibit 2 and observe that exhibit. A. Yes, sir.

Q. Tell the jury what appears in the area which is circled there. A. It is a dark spot.

Q. Is that one that you got as a result of your arm injections? A. Yes, sir.

Q. I ask you to observe Plaintiff's 3. A. It is a small spot there.

Q. Would you tell the jury how the circle which appears on the picture appeared? A. When I was arrested, well, I went to photograph my arm, and one officer, the one that was doing the photographing, said, "This spot wouldn't show up on the picture," so they had taken a pencil or an ink pen and circled it to make sure they could see it, I guess.

Q. Tell the jury what appears within that circle that was made at that time. A. There is a spot there. A spot, a dark spot right there.

Q. Do you know how that spot occurred? A. Yes, sir. In the same way that the others occurred.

Q. I think something has been said about perspiration. Will you tell the jury about your perspiration. A.
121 Well, I am perspiring all my life. Every time, ever since I can remember, I have perspired on top of my nose and on top of my lip. People used to say that I was mean because I perspired all the time. I don't know why I do it. I automatically perspire. It stays there all the time.

Q. Is it a family characteristic, if you know? A. Yes.

Q. Others in your family do the same thing? A. Yes, my grandmother does.

Mr. McMorris: You may cross examine.

Cross Examination

By Mr. Gage:

Q. Didn't you tell the officers that you only perspire when you saw a policeman? A. No, sir, I didn't say that. I told them that I perspire when I get excited.

Q. It is your testimony that you never made any statement at all to any officer about the use of narcotics or answered any questions about the use of narcotics? A. I answered a question about the use of narcotics.

Q. At the scene when they examined you, and they spoke to you, didn't you make a statement that you had had
122 narcotics? A. No, sir.

Mr. McMorris: I object to this as improper cross examination. I believe this wasn't said on direct examination, your Honor.

Q. Was the last time you had any needle injected into your arm? A. I have sold blood also.

Q. When was the most recent time? A. The last time was in '59 that I had a needle stuck in my arm.

Q. What part of 1959? A. It was just a little before Christmas, if I am not mistaken.

Q. Did that leave some scabe on your arm? A. Yes, for a couple of days it was red.

Q. Was that in existence in February 1960? A. No, sir.

Mr. Gage: No further questions.

(The witness left the stand.)

Mr. McMorris: Call Mrs. Fairlur.

127 RUTH FAIRLUR a witness for the defendant, having been previously sworn, testified as follows:

Direct Examination (Resumed)

By Mr. McMorris:

Q. What is your occupation? A. Telephone operator.

Q. Are you acquainted with Mr. Robinson, this defendant? A. Yes, I am.

Q. Were you with him on the night of his arrest? A. Yes, sir, I was.

Q. How long that evening, prior to his arrest, had he been in your compayn? A. He came between 6:30 and 7:00.

Q. And that was after working hours? A. Yes.

Q. And at the time of your arrest, what was being done by the defendant?

Mr. Gage: Objection on the ground it is ambiguous.

The Court: Did you understand the question?

The Witness: I believe I do.

The Court: Overruled. You may answer.

A. I called him from the office.

The Court: Excuse me. It is apparent she does
128 not understand the question. Do you care to reframe it?

Q. Just prior to the stopping by the arresting officer, what was taking place? A. In the car?

Q. As to where you were driving. A. I had asked them—I had aksed Walter if he would come with me to cash my

check, and we met these people at the door of my apartment and we decided that we would go on Western and Venice. Then someone suggested that we go on the east side.

Q. At any rate, you were driving in a car? A. Yes.

Q. Did you have occasion to observe Mr. Robinson during that period? A. Yes.

Q. Did he appear any different to you than what he does today? A. No.

Q. Did you see any drowsiness or any unusual symptoms? A. No.

Q. Do you know anything about his perspiration habit? A. Yes.

Q. Tell the jury about that. A. Well, he sweats,
129 or he sweats on his nose and on his upper lip. When he gets excited or nervous, he sweats—he sweats just all over him.

Q. How long have you known him? A. Three years.

Q. Have you seen him frequently during that time? A. Yes.

Q. How long during that time, if at all, any marks on his body or scars or dark spots? A. Since the—since I have known him they come and they go.

Q. And you have known him since he left the Army, is that right? A. Yes.

Q. When you first knew him or met him he had these spots? A. Yes, he did.

MR. MCMORRIS: No further questions.

Cross Examination

By Mr. Gage:

Q. Your name is Ruth Fairlur? A. That is right.

Q. Did you tell the officer your name was Ruth Robinson? A. No, sir.

Q. Did you tell the officers you lived at 1043
130 South Kingsley? A. I did.

Q. Did you use the name Robinson at all that night or mention it to the officers?

MR. MCMORRIS: I will object to that. I don't think that it is relevant.

A. We were going about 15, 20 miles.

Q. 15 to 20 miles an hour? A. Yes. We weren't speeding.

134 Q. Actually, you were going rather slow for the neighborhood?

MR. MCMORRIS: Object to that as calling for a conclusion.

THE COURT: Sustained.

Q. How far was the place where you were going to cash this check from where you were stopped? A. We were on the west side; we were going to the east side. In distance, I don't know how far it is.

Q. Approximately. A. About fifty blocks, maybe more.

Q. The place you were stopped was about how far from your residence? A. About five blocks.

Q. You were stopped around nine o'clock that night? A. Maybe a little earlier. I didn't have a watch, and didn't know what time it was exactly.

MR. GAGE: No further questions.

THE COURT: Do you wish to inquire further on direct?

Further Direct Examination

By Mr. McMorris:

Q. Will you tell the jury just what happened at the time of the stopping between you and the officers?

MR. GAGE: Object on the ground the question is too broad and ambiguous.

135 THE COURT: It appears to be rather unintelligible in that it is ambiguous. Do you wish to reframe it?

Q. What happened that made you first notice the officers? A. Well, Mr. Banks got out of the car and went around to the back, and I asked Walter what happened.

He looked out of the rear of the car and he said that it was police officers.

Q. Prior to that stopping, you had just been driving along the street? A. That is right.

Q. What did the officers next do? A. The officers—one officer was talking to Mr. Banks, and the other officer came over and asked us to get out of the car while he searched the car.

He asked us to line up beside the wall, no talking. Then they talked to Mr. Banks. He brought him back over to us. We wanted to ask him a question and he said, "No talking."

Mr Gage: Object as a rambling narrative form of answer and not responsive. It is not possible to frame any objection.

The Court: Sustained.

Proceed with the next question.

Q. The three of you lined up against the wall? A. That is correct.

136 Q. And were you yourself searched there? A. Yes, I was.

Q. You had your arm looked at? A. Yes.

Q. Purse looked into? A. Yes.

Q. Did the officer ever tell you why they had stopped you? A. Yes. They said, "You seem to think this is funny."

I said, "Well, it's not funny, but I am surprised."

He said, "Do you know what we are stopping you for," and I said, "No."

They said, "Well, you are supposed to take all the contents out of your purse." I took them out.

Mr. Gage: I object on the ground it is not responsive.

The Court: Overruled.

Have you completed your answer?

Q. Did they ever state to you that a criminal charge was why you were being stopped? A. No.

Q. Did they say anything to you about narcotic addiction? A. They asked if I knew that one of the

137 parties used narcotics, and I said no, but they never told us they were stopping us for narcotics.

Q. How long from the time you were stopped was it until Mr. Robinson was put under arrest, if you know? A. About thirty minutes.

Q. And was there another party placed under arrest at that time? A. Before Mr. Robinson, they placed Mr. Banks under arrest.

Q. They placed Mr. Banks under arrest immediately at the time of stopping? A. Yes.

Q. Between the time of the stopping and the time he was place under arrest, did you see the officers talking together?

Q. How many times? A. Before they placed Mr. Robinson under arrest, they talked three of four different times.

Q. What would they do between those periods of talking.

A. They would come over and get him, look at his pants legs, and his legs, with the flashlight.

Q. Then they would come back to the group? A. Yes.

Q. Did you ever see them looking at his veins at
138 that time? A. No.

MR. MCMORRIS: No further questions.

THE COURT: I think we will take the noon recess at this time. You may step down.

Ladies and gentlemen of the jury, we are about to take the noon recess. Again, I admonish you not to converse among yourselves nor with anyone else on any matter pertaining to this case nor express an opinion or form an opinion until the matter is given to you for your final decision.

We will recess until 2:00 o'clock.

(A recess was taken at 12:00 o'clock noon until 2:00 p.m. of the same day.)

139 LOS ANGELES, CALIFORNIA, WEDNESDAY, JUNE 8, 1960, 2:00 P.M.

THE COURT: The jury is present. Will you resume the stand, Miss Fairlur, please.

RUTH FAIRLUR

a witness for the defendant, resumed the stand, having been previously sworn, testified as follows:

MR. MCMORRIS: I have two more questions.

THE COURT: Yes, you may inquire further on direct examination.

Direct Examination (Resumed)

By Mr. McMorris:

Q. Much has been said of what name you used on the night of the arrest. Did you have with you on that night any identification as to your name? A. I did.

Q. Was this shown to the officers? A. Yes, it was.

Q. What identification did you have? A. I had a check for $123.99 and my identification card issued to me by the Telephone Company.

Q. The Bell Telephone Company? A. Yes.

Q. Do you have that same card with you now?

140 A. Yes, I do.

Q. Does this card have your picture and your name as "Willie"? A. W. R. Fairlur.

Q. It is Willie Ruth Fairlur? A. That is right.

Q. Did you show it to the officers that night? A. I did.

MR. MCMORRIS: No further questions.

THE COURT: You may cross examine.

Cross Examination

By Mr. Gage:

Q. I believe you said the officer never told you why you were stopped or why the car was stopped, or anything about that? A. No.

Q. And they never mentioned narcotics at all, did they? A. One time they did.

Q. They mentioned the fact there was no illumination on the back of the car to illuminate the license plate? A. No, they didn't.

Q. Did you get out and check the car? A. No.

141 Q. How long a time did the officers spend with Mr. Banks talking to him and examining him? A. About five minutes, or less.

Q. Did you hear any of that conversation? A. No, I didn't.

Q. Did you hear any conversation between the two officers? A. Between the two officers?

Q. Yes. A. While they were talking among themselves?

Q. Yes. A. No.

Q. Which officer asked you if you knew that one of the party used narcotics? A. I believe it is Mr. Brown, is his name.

Q. About how much time had elapsed before he asked you that question? A. Oh, I couldn't say exactly, Maybe 15, 20 minutes.

Q. When he asked you that, did he refer to Mr. Robinson or to Mr. Banks, or to both of them? A. He didn't say.

MR. GAGE: I have no further questions.

(The witness left the stand.)

MR. MCMORRIS: I will call at this time Mrs. Robinson.

a witness called by the defendant, was first duly sworn, and testified as follows:

THE CLERK: State your name, please.
THE WITNESS: Ruby Robinson.

Direct Examination

By Mr. McMorris:

Q. Are you related to the defendant in this case? A. Yes, I am.

Q. What is the relationship? A. I am his mother.

Q. Do you recall the night of the arrest which led to this charge? A. Yes.

Q. Do you recall the day of that arrest, the day preceding the night of the arrest? A. Yes.

Q. Did you see your son that night? A. Yes, I did.

Q. Did you have a chance to observe him, to look at him and see how he looked? A. Yes.

Q. Was he at your house that day? A. Yes.

143 Q. Was he working at this time? A. He was working. He hadn't been working that day.

Q. Was he working steadily? A. Yes.

MR. GAGE: Object.

THE COURT: Objection sustained.

Q. Did he look any different when you observed him on this occassion than he does today? A. No, he did not.

Q. Facial or general demeanor? A. No, he didn't.

Q. Did you see anything unusual about his appearance? A. No, I didn't.

Q. How old is he? A. He is twenty-five.

Q. Does he live with you or was he living with you at the time? A. He lives off and on with me and my mother since I lost my father.

Q. At the time of the arrest was he living at your house? A. I wouldn't just say living there. He spent nights with my mother and in the daytime he would be with me, and lots of time he spent the nights.

144 Q. Have you observed on his person any dark marks, or on any portion of his body? A. Yes, I have.

Q. When did you first notice any such marks on him? A. When he came from the service.

Q. When was that? A. About 1957.

Q. Prior to going to the service, you had noticed no such marks? A. No.

Q. And have you noticed them continuously since? A. They have been continuous.

Q. Can you tell the jury whether or not they remain static, remain the same, or do they change? A. They change off and on, and especially if he rubs it sometimes he gets a rash. I was very disturbed and the doctor said they couldn't find anything wrong when he first came from the service.

Q. What changes in appearance do you notice in these marks? A. Well, these marks changes. Like on his face there, they get pinkish color and they stay for a long—I would say for two to three weeks there, and then finally go way and leave a dark spot where it goes away.

Q. It gets lighter and darker? A. Yes.

145 Q. Do you know anything about whether or not he has a tendency to sweat or perspire? A. He had that all his life, about his forehead, his nose, and the top of his top lip.

Q. Did you observe whether or not he was perspiring today? A. Yes, I saw him perspiring today.

Mr. McMorris: You may cross examine.

Cross Examination

By Mr. Gage:

Q. 1043 South Kingsley Drive, you don't live there, do you? A. No, I don't.

Q. Do you know where Mr. Robinson, the defendant, lives when he is not staying with you? A. With my mother.

Q. Does he have an apartment at 1043 South Kingsley Drive? A. No, he doesn't stay there. He might visit there, but he don't live there.

Q. That is not his residence? A. No.

Mr. Gage: No further questions.

(The witness left the stand.)

MR. MCMORRISS The defense is about to rest. I
146 would like to call Mr. Robinson for about three questions

THE COURT: You may do so.

LAWRENCE ROBINSON

previously sworn, resumed the stand and testified further as follows:

Further Direct Examination

By Mr. McMorris:

Q. Mr. Robinson, I believe you stated that at no time you used the narcotics to the officers? A. Yes.

Q. What conversation was had between you and them in regard to the use of narcotics? A. After the officer ordered us out of the car the only conversation I had was with the one in the back there. I don't know his name. He asked me—he told me to take off my jacket and that is the only thing said to me until after I was arrested 30 minutes later when we was in the car.

Q. What was said in the car? A. They asked me if I used narcotics. I told them no. This friend of mine, they asked him. He said—I don't know exactly what he told me. He told them no. By that time they had called in and one of them told me I had been very fortunate
147 that I hadn't been caught. I don't know why I should be—

Q. What did you say to him? A. I said, "I don't know why I should be fortunate because I don't use it."

Q. Was anything else done or said about the use of narcotics in the car? A. No, not that I know of.

Q. Calling your conversation you may have with the investigating officer the next day, Officer Lundquist, what conversation was had between you and him? A. He asked me did I use narcotics, just like the arrest, like the officer did, and I told him no.

He asked me if I had ever been on 55th and Central, and I told him I had passed through there sometimes; I told him I had been through there. He asked me where I hung out, what kind of places I go when I am off work, and I told him I played some pool on 32nd and Central, and that was about it.

He asked me, did I go to bars, and I told him no.

Q. Was there anything said about vomiting? A. No, sir.

Q. Nothing was asked or answered about the vomiting? A. No.

MR. MCMORRIS: Cross examine.

148 Cross Examination

By Mr. Gage:

Q. When you took off your jacket, this was at the scene before you were taken in the police car? A. Yes.

The officers looked at your arms? A. One officer.

Q. Did he use a flashlight to examine the veins? A. Examined the arms, but don't know exactly what spots he was examining, but he went up and down my arm.

Q. With the light? A. Yes, sir.

Q. Did you tell the officer at the booking desk that your residence was 1043 South Kingsley Drive, the booking officer? A. Did I tell the officer at the booking desk my address was 1043 South Kingsley Drive?

Q. Yes. A. I might have.

Q. That was put down on your booking slip. A. I don't know whether I did or not. I might have.

Q. Do you have your booking slip? A. No, I don't.

THE COURT: Just a minute. You may explain your answer.

149 A. If I told him that, it was only for one reason, so that I could call Miss Fairlur so she could call my mother. I could only get one call out of the jail and I wanted to see if Miss Fairlur had gotten home safely, and it was the only way I could make the phone call to her house.

Q. Then do you recall putting dowin a different residence address from your actual address? A. Yes, sir, but they had my driver's license and they knew where I lived.

Q. Do you have your driver's license now? A. No, sir.

Q. And you say that Officer Lundquist asked you about 55th or 51st and Central? A. 55th.

Q. Is he the first one who mentioned that address? A. Yes, sir.

Q. You never mentioned it to him first?

MR. GAGE: No further questions.

MR. MCMORRIS: The defense rests.

THE COURT: Any rebuttal by the People?

MR. GAGE: I have no further questions. The People rest.

Colloquy Between Court and Counsel

THE COURT: Before you begin your argument would you approach the bench.

(The following was had at the bench out of the
150 hearing of the jury.)

THE COURT: So we may understand a little more clearly what counsel has in mind, or perhaps the Court may have in mind, I understand, Mr. Gage, that you are not contending the defendant was under the influence of narcotics at the time of the arrest?

MR. GAGE: No, I don't think we can establish that.

THE COURT: I mention that because, apperently, Mr. McMorris has proceeded on some theory in that connection, and I do not intend to instruct the jury on it because I agree with Mr. Gage. The People have not made out a case, and I will instruct the jury by stating what the charge is; and failing to set forth that, therefore they will not gather that he is charged with that aspect of it.

In other words, Mr. Gage, you are proceeding on the theory that he is addicted to the use of narcotics and that he unlawfully uses narcotics.

MR. GAGE: Yes, sir. However, primarily, on the question of use itself.

THE COURT: Then I shall instruct the jury, in effect, that the People are proceeding on the theory that the defendant is charged with unlawfully using narcotics, and that he is addicted to the use of narcotics and will instruct them accordingly.

MR GAGE: That would be in line with my theory.

MR. MCMORRIS: At this time, may I renew my
151 motion and argue for the instruction that they return a verdict of not guilty.

May I ask a question first? It takes a great deal of leeway. Will the case be re-opened on anything that I might say at this time of way of further proof?

THE COURT: I can't say as to that. I can't anticipate what will be said, Mr. McMorris.

MR. McMORRIS: Perhaps I should reserve it for a motion for a new trial.

THE COURT: The only thing I can say is this: I am sure that I feel the same as counsel does, that a lawsuit is not a game of wits. It is a proceeding to attempt to determine the truth of a situation; and in the search to arrive at the truth, I think the Court should follow whatever course would present itself legally to arrive at that conclusion. Therefore, I will be unable to answer your question as you have stated it.

MR. McMORRIS: I always take the position, once both parties have rested, that it is an almost abusive discretion to permit additional evidence for the purpose of proving an element left out.

THE COURT: That is the general proposition, but I would not to state to you that would always be this Court's view—that it could never be re-opened, because the interest of justice might require it.

Renewal of Motion for Directed Verdict and Denial Thereof

MR. McMORRIS: I renew the motion, generally, and
152 say, that I don't believe they proved addiction, nor have they proved use as required under the decisions. I think the jury should be so instructed, and so move.

THE COURT: Your motion for a directed verdict of acquittal is denied.

I will have the instructions so you will be able to examine them prior to your argument. I don't have them so Mr. Gage can see them, so you will have to proceed without them unless you wish the Court to take a recess. I think you generally are familiar with what I intend to instruct the jury.

MR. GAGE: I am.

THE COURT: You are not requesting a recess?

MR. GAGE: No.

THE COURT: Prior to your closing argument you will both be able to examine them.

(The following was had in open court.)

THE COURT: You may proceed with your opening argument.

(Argument by counsel.)

(Instructions by the Court to the jury.)

• • • • • • • • • • •

154 We hereby stipulate that the foregoing is a true and correct partial transcript of testimony given in the proceedings had upon the trial in the herein entitled action.

Dated this day of , 1961.

_____

Attorney for Plaintiff.

_____

Attorney for Defendant.

Order Settling Record—February 21, 1961

I hereby certify that the foregoing transcript, pages 72 to 134, as corrected is a true and correct transcript of a part of the proceedings had upon the trial, and that the same is settled, allowed, and made a part of the record of this case.

Dated this 21 day of Feb., 1961.

KENNETH L. HOLADAY
Judge

155 (Filed Oct. 17, 1960)

IN THE MUNICIPAL COURT
OF LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

No. 114 162

People vs. Robinson

Jury Instructions

GIVEN

Filed Jun. 9, 1960 George J. Barbour, Clerk, by G. A. Spence, Deputy

156

MUNICIPAL COURT

LOS ANGELES JUDICIAL DISTRICT

1

Ladies (and Gentlemen) of the Jury:

It becomes my duty as judge to instruct you concerning the law applicable to this case (~~these consolidated cases~~), and it is your duty as jurors to follow the law as I shall state it to you.

The function of the jury is to try the issues of fact that are presented by the allegations in the complaint(s) filed in this court and the defendant's plea ~~(s) (defendants' pleas)~~ of "not guilty." This duty you should perform uninfluenced by pity for the defendant(s) or by passion or prejudice against him ~~(her)~~ (them). You must not suffer yourselves to be biased against the defendant(s) because of the fact that he ~~(she)~~ has (~~they have~~) been arrested for this alleged offense (~~these alleged offenses~~) or because a complaint has (~~complaints have~~) been filed against him ~~(her)~~ (~~them~~) or because he ~~(she)~~ has (~~they have~~) been brought before the court to stand trial. None of these facts is evidence of his ~~(her)~~ (~~their~~) guilt, and you are not permitted to infer or to speculate from any or all of them that he ~~(she)~~ is (~~they are~~) more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. ~~Both the People and the defendant(s) have a right to demand, and they do demand and expect,~~ that you will conscientiously and dispassionately consider and weight the evidence and apply the law of the case, and that you will reach (a) just verdict(s) regardless of what the consequences of such verdict(s) may be. ~~That (Each) verdict must express the individual opinion of each juror.~~

Title and number of case(s)

People vs.

No.

People vs.

No.

GIVEN on Courts own motion

Date JUN 9 - 1960

H. Hollcraft

Judge

88

157

The jury is the sole and exclusive judge of the facts and of the weight of evidence, and you are to weigh the facts upon the testimony and other evidence produced ~~or stipulated to~~ here in court. ~~If any facts have been stipulated to, such facts are to be deemed as conclusively proven~~. If any evidence has been admitted and afterward stricken out, you must disregard the matter so stricken out, entirely, and if any counsel (~~the defendant or the counsel for the people~~) has intimated any questions which the court has not permitted to be answered, that certain things are, or are not, true, you must disregard such questions and refrain from any inference based upon them. If counsel upon either side ~~(the defendant or the counsel for the people)~~ has made any statements in your presence concerning the facts in the case (~~other than stipulations, or testimony given from the witness stand~~), you must be careful not to regard such statements as evidence, but to look entirely to the evidence as produced ~~or stipulated to~~ in ascertaining what the facts are. If counsel upon either side (~~the defendant or the counsel for the people~~) has expressed an opinion as to the guilt or innocence of the (~~ap~~) defendant, such opinion is to be disregarded.

JUN 9 - 1960

Given on court's own motion

H. Kolb

Judge

158

3

The jurors are the sole and exclusive judges of the ~~effect and value of evidence addressed to them~~ and of the credibility of the witnesses who have testified in the case. The character of the witnesses, as shown by the evidence, should be taken into consideration, for the purpose of determining their credibility and determining whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand and consider their relation to the case, if any, together with their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he or she testifies, his or her interest in the case, if any, or his or her bias or prejudice, if any, against one or any of the parties, by the character of his or her testimony, ~~or by evidence affecting his or her character for truth, honesty or integrity~~ or by contradictory evidence, ~~and the jurors are the exclusive judges of his or her credibility.~~

Given on court's own motion

Judge

90

159

4

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his ~~(her)~~ guilt is satisfactorily shown, he ~~(she)~~ is entitled to an acquittal, but the effect of this presumption is only to place upon the State the burden of proving him ~~(her)~~ guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

~~The law does not require demonstration, or that~~ degree of proof which, ~~excluding~~ all possibility of error, produces absolute certainty, for such degree of proof is rarely possible. Only that degree of proof is necessary which convinces the mind and directs and satisfies the ~~conscience of those who are bound to act conscientiously upon it.~~

JUN 5 1911

Given on court's own motion

Judge

160

5

GENERAL MANDATORY INSTRUCTIONS

A

Two Classes of evidence are recognized and admitted in courts of justice, upon either or both of which, if adequately convincing, juries may lawfully find a accused either guilty or innocent of an offense charged. One is direct evidence and the other is circumstantial evidence. Direct evidence consists of the testimony of every witness who, with any of his or her own physical senses, perceived any act or any of the conduct, and which testimony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions, or other circumstances, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict if it carries the convincing quality required by law. You are not permitted, however, on circumstantial evidence alone, to find the ( ) defendant guilty of the (any) crime charged against him (her) unless the circumstances not only are entirely consistent with the theory of guilt but are inconsistent with any other rational conclusion.

If the ~~circumstantial~~ evidence in this case ~~(as to any particular count)~~ is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the (a) defendant and the other to his (her) innocence, it is your duty, under the law, to adopt that interpretation which will admit of the (a) defendant's innocence, and reject that which points to his (her) guilt.

(General Mandatory Instructions - conts. - page 2)

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to the guilt of the ~~(a)~~ defendant, the entire proof must carry the convincing force required by law to support a verdict of guilt.

B

Duly qualified experts are permitted to give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion, with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may disregard any such opinion, if it shall be found by them to be unreasonable.

C

~~Relative to the testimony pertaining to the character of the defendant(s) in respect to those traits of character which ordinarily would be involved in the commission of (a) crime(s) like that (those) charged in this case (these cases), I instruct you as follows:~~

~~Such evidence is regarded by the law as relevant to the question whether the defendant is (the defendants are) innocent or guilty of the crime(s) charged, because the jury~~

JUN 9 - 1960.

Given as read
Holaday
Dodge

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(General Mandatory Instructions - contd. - page 3)

~~may, if its judgment so directs, reason that it is improbable~~ that a person of good character in such respects would have conducted himself (herself) as alleged. Character evidence of itself may be sufficient to raise a reasonable doubt whether or not a defendant is guilty; hence you must consider such evidence in connection with all other evidence in the case, but if, after weighing all the evidence, you are convinced beyond a reasonable doubt that the (a) defendant is guilty of the (a) crime(s) charged against him (her) in the complaint(s) on file herein, your duty will be to find him (her) guilty (of that crime) (of those crimes) notwithstanding the testimony that he (she) ~~was or is a person of good character.~~

D

The law of this state admonishes you to view with caution the testimony of any witness which purports to relate an oral admission of the ~~(a)~~ defendant or an oral confession by him (her).

E

~~Where a statute denounces a series of acts, each of~~ which separately and all together constitute an offense, a complaint, or a count in a complaint, is sufficient which charges all the acts denounced by the statute, and may be supported by proof in the record which shows the commission of one of the series of acts.

In order to convict a defendant upon a complaint, or a count in a complaint, which charges such defendant with having done two or more acts, it is necessary, before a verdict of guilty can be returned, that all members of the jury agree upon ~~the particular~~ act on which guilt depends, but it is not necessary

JUN 9 - 1960

Narcotics
Use - Influence - Addicted

PLAINTIFF'S PROPOSED INSTRUCTION NO. _____

~~YOU ARE INSTRUCTED that~~, Insofar as here applicable, Section 11721 of the Health and Safety Code provides that no person shall use, ~~or be under the influence of~~, or be addicted to the use of narcotics, except when administered by or under the direction of a person licensed by the State of California to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor.

~~The Health and Safety Code declares that no person other than a physician, dentist, chiropodist or veterinarian shall write a prescription and that except in the regular practice of his profession no person shall prescribe, administer, or furnish a narcotic to or for any person who is not under his treatment for a pathology or condition other than narcotic addiction. A physician may prescribe for, furnish to, or administer narcotics to his patient when the patient is suffering from a disease, ailment, injury, or infirmities attendant upon old age, other than narcotic addiction. The physician shall prescribe, furnish, or administer narcotics only in such quantity and for such length of time as is reasonably necessary. A veterinarian shall not prescribe, administer, or furnish a narcotic for himself or any other human being.~~

You will ~~take~~ note that ~~the legislature of the State has effectively made~~ it a misdemeanor for a person either ~~(a)~~ to use narcotics, ~~(b) to be under the influence of narcotics~~, or ~~(c)~~ to be addicted to the use of narcotics, unless the use, ~~or the condition of being under the influence of~~, or being addicted to narcotics, was administered or used under the direction of a person licensed by this state. In other words, the use, ~~status, or condition of being under the influence of~~, or being addicted to narcotics is unlawful unless a doctor, dentist or a chiropodist of this state has prescribed such use or has administered such a narcotic. That portion of the statute

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referring to the "use" of narcotics is based upon the "act" of using. That portion of the statute referring to "under the influence" and "addicted to the use" of narcotics is based upon a condition or status. They are not identical. A person may make use of narcotics once or for a short time without becoming or being addicted to the use of narcotics, or may by reason of having recently used narcotics be under the influence thereof.

You are instructed that, if a narcotic drug is appreciably affecting the nervous system, brain, muscles, or other parts of a person's body, or is creating in his any perceptible abnormal mental or physical condition, then such a person is under the influence of a narcotic within the meaning of the statute.

You are instructed that the word "addicted" means, strongly disposed to some taste or practice or habituated, especially to drugs. In order to inquire as to whether a person is addicted to the use of narcotics is in effect an inquiry as to his habit in that regard. Does he use them habitually. To use them often or daily is, according to the ordinary acceptance of those words, to use them habitually.

To be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. The existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present.

If you find that the evidence here presented has shown defendant's status or condition to have been that of a person addicted to the use of narcotics, not administered by or under the direction of a person licensed by this state to prescribe and administer narcotics, at one time prior to the date stated in the complaint, and so near thereto as to afford a reasonable basis for supposing

that this status or condition has continued to the date of this charge, it is for you to determine whether or not the intervening time was no more than is usual for the continuance of such a status or condition to be that as charged.

The law presumes that a thing once proved to exist continues as long as is usual with things of that nature. Thus, where a status or condition is shown to exist, the presumption is that this status or condition continues until the contrary is shown. A result of this rule is to cast upon the defendant the burden of showing his reformation, for this is a fact which comes more immediately within his knowledge than within the knowledge of anyone else. He has the right to show that even if once of the status or condition described by the statute, he has reformed. This he may do by a showing of such conduct as would tend to display a real change of heart in such matters. His burden in this respect is to produce such evidence as would raise a reasonable doubt of his guilt.

If you find that the defendant has in the past been a person addicted to the use of narcotics not administered or used under the direction of a person licensed by the State of California, you must, before finding him guilty of the present charge, be convinced beyond a reasonable doubt that his status or condition as such a person has continued from such prior time to the date of the present charge. In other words, that he has not reformed and is still a person whose status or condition is that of a person addicted to the use of narcotics, not administered or used under the direction of a licensed person.

If you are convinced beyond a reasonable doubt that the defendant is a person addicted to the use of narcotics, not administered or used under the direction of a licensed person, by reason of the status or condition shown at the time of his arrest regardless of what his past status or condition has been, you may find him guilty of the offense charged.

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You are further instructed that, where a statute such as that which defines the crime charged in this case denounces an act and a status or condition, either of which separately as well as collectively, constitute the criminal offense charged, an accusatory pleading which accuses the defendant of having committed the act and of being of the status or condition so denounced by the statute, is deemed supported if the proof shows that the defendant is guilty of any one or more of the offenses thus specified. However, it is important for you to keep in mind that, in order to convict a defendant in such a case, it is necessary that all of you agree as to the same particular act or status or condition found to have been committed or found to exist. It is not necessary that the particular act or status or condition so agreed upon be stated in the verdict.

If you all agree that the defendant did use narcotics not administered by or under the direction of a person licensed by the state to prescribe and administer narcotics, you must find that such use had been committed within the County of Los Angeles before you may find the defendant guilty of violating the statute which refers to such use of narcotics.

If you all agree that the defendant was under the influence of, or was addicted to the use of narcotics, not administered by or under the direction of a person licensed by the State of California, it is immaterial where the use or addiction took place as long as the defendant is found to be under the influence of or addicted to the use of narcotics, not administered by or under the direction of a licensed person of this state, while within the City of Los Angeles.

You are further instructed that under the terms of the statute here involved it is not incumbent upon the People to prove the unlawfulness of defendant's use of narcotics. All that the People must show is either that the defendant did use a narcotic in Los Angeles County, or that while in the city of Los Angeles he was under the influence of narcotics or was addicted to the use of

narcotics, and it is then up to the defendant to prove that the use, ~~or the condition of being under the influence of as~~ of being addicted to the use of narcotics was administered by or under the direction of a person licensed by the State of California to prescribe and administer narcotics or at least to raise a reasonable doubt concerning the matter.

Requested by _____

GIVEN on Court's motion ___ as Requested ___ as Modified ✓

REFUSED Date JUN [illegible]

_____ Judge

Note: The circumstantial evidence instruction must also be given.
Sections 11161, 11163, 11320, 11450, 11721, Health & Safety Code
People v. Thompson, CR A 3480, 144 Cal. App. (2d) Supp. 854;
People v. Jarreaui, 142 Cal. App. (2d) 555;
People v. Culbarson, 140 Cal. App. (2d) Supp. 959.

5.

(City Attorney's Index No. 11,000)

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3

INDIVIDUAL OPINION REQUIRED.

The People and the defendant~~s~~ both ~~all~~ are entitled to the individual opinion of each juror. It is the duty of each of you, after considering all the evidence in the case, to determine, if possible, the question of the guilt or innocence of the defendant. When you have reached a conclusion in that respect, you should not change it merely because one or more or all of your fellow jurors may have come to a different conclusion, or merely to bring about a unanimous verdict. However, each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be drawn therefrom. If, after doing so, any juror should be satisfied that a conclusion first reached by him was wrong, he unhesitatingly should abandon that original opinion and render his verdict according to his final decision.

3 - CALJIC - revised.

Requested by.....

GIVEN on Court's motion ☑ as Requested ☐ as Modified ☐

REFUSED ☐ Date JUN 9 - 1969

..... Judge

100

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4

HOW JURORS SHOULD APPROACH THEIR TASK

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates, but rather judges. The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the court reminds you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

4 CALJIC revised

Requested by.....

GIVEN as Court's motion ☒ as Requested ☐ as Modified ☐

REFUSED ☐

Date JUN 9 - 1970

.....Judge

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Ladies and gentlemen of the jury, the instruction heretofore read to you by the Court which defines Section 11721 of the Health and Safety Code of the State of California, what the word "addicted" means and what the word "use" means is hereby stricken and you are instructed to disregard such instruction in its entirety.

Requested by .....

GIVEN on Court's motion ☒ as Requested ☐ as Modified ☐

REFUSED ☐ Date JUN 3 1964

..... Judge

102

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Narcotics
Use - Influence - Addicted

PLAINTIFF'S PROPOSED INSTRUCTION NO. ____

Ladies and Gentlemen of the jury, you are now instructed that insofar

~~YOU ARE INSTRUCTED THAT, [illegible]~~ as here applicable,

Section 11721 of the Health and Safety Code provides that no person shall use, ~~or be under the influence of~~, or be addicted to the use of narcotics, except when administered by or under the direction of a person licensed by the State of California to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor.

~~The Health and Safety Code declares that no person other than a physician, dentist, chiropodist or veterinarian shall write a prescription and that except in the regular practice of his profession no person shall prescribe, administer, or furnish a narcotic to or for any person who is not under his treatment for a pathology or condition other than narcotic addiction. A physician may prescribe for, furnish to, or administer narcotics to his patient when the patient is suffering from a disease, ailment, injury, or infirmities attendant upon old age, other than narcotic addiction. The physician shall prescribe, furnish, or administer narcotics only in such quantity and for such length of time as is reasonably necessary. A veterinarian shall not prescribe, administer, or furnish a narcotic for himself or any other human being.~~

You will ~~also~~ note that ~~the legislature of the State has effectively made~~ it a misdemeanor for a person either (a) to use narcotics, ~~(b) to be under the influence of narcotics~~, or (b) to be addicted to the use of narcotics, unless the use, ~~or the condition of being under the influence of~~, or being addicted to narcotics, was administered or used under the direction of a person licensed by this state. In other words, the use, ~~status, or condition of being under the influence of~~, or being addicted to narcotics is unlawful unless a doctor, dentist or a chiropodist of this state has prescribed such use or has administered such a narcotic. That portion of the statute

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referring to the "use" of narcotics is based upon the "act" of using. That portion of the statute referring to ~~"under the influence" and~~ "addicted to the use" of narcotics is based upon a condition or status. They are not identical. A person may make use of narcotics once or for a short time without becoming or being addicted to the use of narcotics. ~~by reason of having recently used narcotics be under the influence thereof.~~

~~You are instructed that, if a narcotic drug is appreciably affecting the nervous system, brain, muscles, or other parts of a person's body, or is creating in him any perceptible abnormal mental or physical condition, then such a person is under the influence of a narcotic within the meaning of the statute.~~

~~You are instructed that~~ The word "addicted" means, strongly disposed to some taste or practice or habituated, especially to drugs. In order to inquire as to whether a person is addicted to the use of narcotics is in effect an inquiry as to his habit in that regard. Does he use them habitually. To use them often or daily is, according to the ordinary acceptance of those words, to use them habitually.

To be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. The existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present.

~~If you find that the evidence here presented has shown defendant's status or condition to have been that of a person addicted to the use of narcotics, not administered by or under the direction of a person licensed by this state to prescribe and administer narcotics, at one time prior to the date stated in the complaint, and so near thereto as to afford a reasonable basis for supposing~~

that this status or condition has continued to the date of this charge, it is for you to determine whether or not the intervening time was no more than is usual for the continuance of such a status or condition to be that as charged.

The law presumes that a thing once proved to exist continues as long as is usual with things of that nature. Thus, where a status or condition is shown to exist, the presumption is that this status or condition continues until the contrary is shown. A result of this rule is to cast upon the defendant the burden of showing his reformation, for this is a fact which comes more immediately within his knowledge than within the knowledge of anyone else. He has the right to show that even if once of the status or condition described by the statute. he has reformed. This he may do by a showing of such conduct as would tend to display a real change of heart in such matters. His burden in this respect is to produce such evidence as would raise a reasonable doubt of his guilt.

If you find that the defendant has in the past been a person addicted to the use of narcotics not administered or used under the direction of a person licensed by the State of California, you must, before finding him guilty of the present charge, be convinced beyond a reasonable doubt that his status or condition as such a person has continued from such prior time to the date of the present charge. In other words, that he has not reformed and is still a person whose status or condition is that of a person addicted to the use of narcotics, not administered or used under the direction of a licensed person.

If you are convinced beyond a reasonable doubt that the defendant is a person addicted to the use of narcotics, not administered or used under the direction of a licensed person, by reason of the status or condition shown at the time of his arrest regardless of what his past status or condition has been, you may find him guilty of the offense charged.

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~~You are further instructed that,~~ Where a statute such as that which defines the crime charged in this case denounces an act and a status or condition, either of which separately as well as collectively, constitute the criminal offense charged, an accusatory pleading which accuses the defendant of having committed the act and of being of the status or condition so denounced by the statute, is deemed supported if the proof shows that the defendant is guilty of any one or more of the offenses thus specified. However, it is important for you to keep in mind that, in order to convict a defendant in such a case, it is necessary that all of you agree as to the same particular act or status or condition found to have been committed or found to exist. It is not necessary that the particular act or status or condition so agreed upon be stated in the verdict.

~~If you all agree that the defendant did use narcotics not administered by or under the direction of a person licensed by the state to prescribe and administer narcotics, you must find that such use had been committed within the County of Los Angeles before you may find the defendant guilty of violating the statute which refers to such use of narcotics.~~

~~If you all agree that the defendant was under the influence of,~~ or was addicted to the use of narcotics, not administered by or under the direction of a person licensed by the State of California, it is immaterial where the use or addiction took place as long as the defendant is found to be under the influence of or addicted to the use of narcotics, not administered by or under the direction of a ~~licensed person of this state, while within the city of Los Angeles.~~

~~You are further instructed that under the terms of the statute here involved~~ It is not incumbent upon the People to prove the unlawfulness of defendant's use of narcotics. All that the People must show is either that the defendant did use a narcotic in Los Angeles County, or that while in the City of Los Angeles he ~~was under the influence of narcotics or~~ was addicted to the use of

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narcotics, and it is then up to the defendant to prove that the use, ~~or his condition of being under the influence of~~ or of being addicted to the use of narcotics was administered by or under the direction of a person licensed by the State of California to prescribe and administer narcotics or at least to raise a reasonable doubt concerning the matter.

Requested by _____

GIVEN on Court's motion ___ as Requested ___ as Notified ✓

REFUSED Date JUN 3 · 1960

Judge

Note: The circumstantial evidence instruction must also be given.
Sections 11161, 11163, 11320, 11450, 11721, Health & Safety Code
People v. Thompson, CR A 3480, 144 Cal. App. (2d) Supp. 854;
People v. Javraqui, 142 Cal. App. (2d) 555;
People v. Culberson, 140 Cal. App. (2d) Supp. 959.

(City Attorney's Index No. 11,000)

8.

INSTRUCTIONS TO BE CONSIDERED AS A WHOLE

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

HISTORY of this instruction shown by check (V) marks	
Requested by People	
Requested by Defendant	
Given on Court's Motion	✓
Given as Requested	
Given as Modified	
Refused	

JUN 9 - 1960

Instruction numbers, captions and titles are not parts of the respective instructions, and have not been read to the jury.

Judge

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CONCLUDING INSTRUCTION

Upon retiring to the jury room you will select one of your fellow jurors to act as foreman, who will preside over your deliberations and who will sign the verdict(s) to which you may agree. In order to return a verdict it is necessary that all of the jurors agree to the decision. As soon as all of you have agreed upon (a) verdict(s), you shall have it (them) signed and dated by your foreman and then return with it (them) to this room.

JUN 9 - 1960

Given on court's own motion

Judge

(File endorsement omitted)

178 MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Cr. A4425

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff*,

v.

LAWRENCE ROBINSON, *Defendant*.

Verdict—June 9, 1960

We, the jury in the entitled cause, find the defendant guilty of the offense charged. (viol. 11721 H.&S.)

MELVIN L. ENGLE
Foreman.

Date: June 9, 1960

179 (File endorsement omitted)

IN THE MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff*,

v.

LAWRENCE ROBINSON, *Defendant*.

Proposed Statement on Appeal—Filed June 27, 1960

BE IT REMEMBERED that on the 6th day of June, 1960, the above-entitled matter came on for hearing in Division 13 of the above entitled Court, the Honorable Kenneth L. Holaday, Judge presiding.

Notice is hereby given that the evidence and other proceedings herein will be furnished by way of reporter's transcript, and that defendant will move the Court that such transcript be furnished under Sections 72195, 69952, and 72604 of the Government Code of the State of California.

Defendant will base his appeal upon all adverse rulings of the said Court appearing on the said record; upon all grounds specified in Section 1181 of the Penal Code; upon all grounds stated by defendant upon motion for new trial and in arrest of judgment, including but not limited to the following:

(1) That the ordinance under which defendant was convicted is unconstitutional, in that, inter alia, the said ordinance is unconstitutionally vague, indefinite, and uncertain, and further in that the said ordinance denies defendant's rights to Equal Protection and to Due Process under the federal and state constitutions;

180 (2) Evidence educed through unreasonable search and seizure and self incrimination, materially affecting the right of defendant, was admitted over defendant's objections by the trial court;

(3) The court misdirected the jury in matters of law;

(4) Several causes of action were improperly joined in a single count;

(5) The court erred in failing to submit the factual question re probable cause to the jury;

(6) The court erred in assisting the City Attorney in laying a foundation for expert testimony and for admissions;

(7) Purported admissions and confessions were admitted in evidence without a prior showing of the voluntariness thereof;

(8) The verdict and judgment are contrary to law and the evidence;

(9) It was error to permit the jury to use a magnifying glass to view photographs presented in evidence;

(10) The court erred in not affirmatively giving defendant the opportunity to poll the jury.

LAWRENCE ROBINSON

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181 **Order Re Statement on Appeal—October 11, 1960**

The Court does now settle and allow that portion of the Statement on Appeal on page one thereof beginning with line eighteen and ending with the word transcript on line nineteen and Reporter's Transcript as corrected of a portion of the proceedings had upon the trial and certifies that the same is a true and correct.

KENNETH L. HOLADAY
Judge of the Municipal Court of Los Angeles Judicial District.

Oct. 11, 1960

• • • • • • • • • • •

183 (File endorsement omitted)

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Superior Court No. CR A 4425

Trial Court No. 114162

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent*,

v.

LAWRENCE ROBINSON, *Defendant and Appellant*.

Memorandum Opinion—March 31, 1961

Appeal by defendant from order granting probation (referred to as "judgment" in notice of appeal) and order denying motion for new trial, of the Municipal Court of the Los Angeles Judicial District, Kenneth L. Holaday, Judge. Affirmed.

For Appellant—Samuel C. McMorris, Esq.

For Respondent—Roger Arnebergh, City Attorney
Philip E. Grey, Assistant City Attorney
William E. Doran, Deputy City Attorney

The defendant was convicted of violating Health and Safety Code § 11721 which provides, "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics." He appeals from the order granting probation (referred to as "judgment" in notice of appeal) and order denying a new trial.

Appellant's principal point is that the section, or at least the provision making it a misdemeanor to be addicted to the use of narcotics, is unconstitutional in that it is vague,
indefinite and uncertain. It is a crime of status.
184 This court has held in a number of cases that the section is constitutional. In *People* v. *Bunn* (1959), our Cr. A. 4062, we said: "There is no merit in the claim

[of appellant] that Health and Safety Code 11721 is unconstitutional because it makes being a narcotic addict a misdemeanor." To the same effect is *People* v. *Donlin* (1960) our Cr. A. 4422. We shall, therefore, follow the rule of stare decisis. However, we are not unmindful that the Supreme Court, *In re Newbern* (1960) 53 Cal. 2d 786, held that Penal Code 647 subsec. 11, which made it a misdemeanor to be a common drunkard, was so vague and uncertain that it was unconstitutional. This might cause the higher courts to review the crime of being a narcotic addict or any crime of status. Although at present no appeal lies from the appellate department of the Superior Court to the District Court of Appeal or the Supreme Court, yet habeas corpus lies to test the constitutionality of the section in question. We would welcome such a test.

Appellant also claims that the court erred in not submitting to the jury the foundation evidence as to whether the search and seizure was lawful. The court acted properly in receiving this evidence outside the presence of the jury. The sufficiency of that foundation evidence is a question of law. In *People* v. *Gorg* (1955) 45 Cal. 2d 776, the court said at p. 781, "The probative value of evidence obtained by a search or seizure, however, does not depend on whether the search or seizure was legal or illegal, and no purpose would be served by having the jury make a second determination of that issue."

We have considered all other points urged by appellant and find them without merit.

The order granting probation and order denying motion for new trial are affirmed.

Dated March 31, 1961

[Illegible]
Presiding Judge

We concur:

HULS, *Judge*
SMITH, *Judge*

(File endorsement omitted)

185 IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 4425
Trial Court No. 114162

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,*

v.

LAWRENCE ROBINSON, *Defendant and Appellant.*

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California.

Judgment—March 31, 1961

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the order granting probation and order denying motion for new trial made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed.

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200 (File endorsement omitted)

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Order Denying Rehearing—April 11, 1961

The petition of appellant for a rehearing after judgment of this court on appeal in the above-entitled case having been filed and having been duly considered,

Said petition is hereby denied.

Dated April 11, 1961

BY THE COURT.

[Illegible]
Presiding Judge

HULS
Judge

SMITH
Judge

202 (File endorsement omitted)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES
APPELLATE DEPARTMENT

No. CR A 4425

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff-Respondent*

v.

LAWRENCE ROBINSON, *Defendant-Appellant*

Notice of Appeal to the Supreme Court of the United States —Filed June 26, 1961

Notice is hereby given that appellant above-named hereby appeals to the Supreme Court of the United States from the final order of the above-entitled court on the 31st day of March, 1961, affirming the judgment of conviction of appellant by the Municipal Court.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

Appellant was convicted of violating Health and Safety Code Section 11,721, which provides, "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics;" was sentenced to two years probation, the first four months of which were to be served in the County Jail, Los Angeles, with execution of the said sentence beginning on the 19th day of April, 1961, upon remittitur following appeal to the above-entitled court.

II

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include therein the Reporter's and Clerk's Transcripts of the trial and appeal
203 hereinbelow.

III

The following questions are presented by this appeal:

A. Section 11,721 of the Health and Safety Code Denies Appellant's Right, Under the 14th Amendment of the United States Constitution, to Due Process and to Equal Protection of the Laws in That:

(1) The said statute punishes a status, not an act or omission.

(2) It punishes an involuntary status.

(3) It punishes a condition of mental and physical illness.

(4) It is vague, indefinite, and uncertain.

(5) Double jeopardy is inherent in a crime of status.

(6) The statute is an unwarranted and unconstitutional infringement on freedom of movement.

(7) It is ex post facto.

(8) It imposes cruel and unusual punishment.

B. Procedural Due Process of Law Was Denied by the Introduction of Evidence Obtained Through Unreasonable Search and Seizure and Self-Incrimination, Materially Affecting the Right of Defendant, Under the 14th Amendment.

C. Procedural Due Process of Law Was Denied by a Conviction Totally Devoid of Evidentiary Support.

Respectfully submitted,
SAMUEL C. McMORRIS
Samuel C. McMorris
Attorney for Appellant

PROOF OF SERVICE BY MAIL

(Omitted in printing)

(Clerk's Certificate to foregoing transcript omitted in printing)

SUPREME COURT OF THE UNITED STATES

No. 444 Misc., October Term 1961

LAWRENCE ROBINSON, *Appellant*,

v.

CALIFORNIA

Order Granting Motion for Leave to Proceed in Forma Pauperis—November 20, 1961

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

November 20, 1961

SUPREME COURT OF THE UNITED STATES

No. 444 Misc., October Term 1961

LAWRENCE ROBINSON, *Appellant*,

v.

CALIFORNIA

Order Noting Probable Jurisdiction—November 20, 1961

APPEAL from the Appellate Department of the Superior Court of the State of California, County of Los Angeles.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the appellate docket as No. 554.

November 20, 1961

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 554

LAWRENCE ROBINSON,

Appellant,

—VS.—

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF LOS ANGELES

APPELLANT'S OPENING BRIEF

I

Reference to Official Reports

Appellant hereby appeals to the Supreme Court of the United States from the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and filed on the 31st day of March, 1961, Case No. Cr-A 4425, affirming petitioner's conviction in the Municipal Court of the Los Angeles Judicial District, in Case No. 114162 therein, of the violation of Section 11,721 of the Health and Safety Code, which provides, "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of

B. Procedural Due Process of Law Was Denied by the Introduction of Evidence Obtained Through Unreasonable Search and Seizure and Self-Incrimination, Materially Affecting the Rights of Defendant, Under the 14th Amendment.

C. Procedural Due Process of Law Was Denied by a Conviction Totally Devoid of Evidentiary Support.

Statement of the Case

The facts of this case, as found in the Reporter's Transcript on Appeal, with appropriate page references therefrom are as follows:

On the 4th day of February, 1960, appellant was riding in the back seat of a motor vehicle, accompanied by appellant's lady friend and by a second couple in the front seat. The arresting officers were attracted to the vehicle by the fact that it "had no rear license plate illumination" (R. p. 17, l. 1). Much illumination is thrown on the reasons for the arrest of defendant by the admission, on cross-examination, of the arresting officers (R. p. 23, ll. 4-7):

> "Q. Now, your reason for stopping him was, eventually, the lack of rear view illumination; is that right? A. And the fact that he was driving slowly on a dark, unlit street, yes."

On direct examination, in straining to justify the obviously wrongful arrest of defendant, the officers mentioned something about the reputation of the general neighborhood for purse-snatching (R. p. 19, l. 19, et ff.).

It developed on cross-examination, however, that the whole of the Division in which the officers served (if not,

IN THE SUPREME COURT OF THE UNITED STATES

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LAWRENCE ROBINSON,

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APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF LOS ANGELES

APPELLANT'S OPENING BRIEF

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Counsel for Appellant

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SUBJECT INDEX

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a person licensed by the state to prescribe and administer narcotics."

The opinion of the Appellate Department is unreported, in that it is a memorandum opinion, but it will be appended hereto.

Jurisdictional Grounds

The judgment of the Appellate Department was entered, as aforesaid, on the 31st day of March, 1961. Thereafter, because of the desirability of having federal constitutional issues decided by the highest courts of the states before resort is had to this Honorable Court, appellant filed his petition for Writ of Habeas Corpus or Prohibition, No. 7660, in the District Court of Appeal of the State of California, Second Appellate District, which said petition was denied without opinion on the second day of May, 1961. Thereafter, appellant sought a hearing in the Supreme Court of the State of California, and on the 31st day of May, 1961, the said Court denied appellant's petition.

Thereafter, Notice of Appeal to the Supreme Court of the United States was filed with the clerk of the said Appellate Department, on the 26th day of June, 1961, notice thereof having been served by mail upon Counsel for Appellee.

This appeal is taken pursuant to 28 U.S.C. 1257 (2), which is as follows:

1257. Final judgments or decrees rendered by the highest courts of the state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Provisions of Law Involved

In addition to Section 11,721 of the Health and Safety Code, above set forth, on which the conviction appealed from is based, reference will be made herein from the 14th amendment to the United States Constitution and to section 647 of the California Penal Code, as it appeared prior to September 15, 1961, and in its present form. The said amendment and statute will be set forth in full in the appendix hereto.

Questions Presented for Review and Summary of Argument

The following questions are presented by this appeal:

A. Section 11,721 of the Health and Safety Code Denies Appellant's Right, Under the 14th Amendment of the United States Constitution, to Due Process and to Equal Protection of the Laws in That:

(1) The said statute punishes a status, not an act or omission.

(2) It punishes an involuntary status.

(3) It punishes a condition of mental and physical illness.

(4) It is vague, indefinite, and uncertain.

(5) Double jeopardy is inherent in a crime of status.

(6) The statute is an unwarranted and unconstitutional infringement of freedom of movement.

(7) It is ex post facto.

(8) It imposes cruel and unusual punishment.

indeed, the whole of the city) might be considered a high purse-snatching, or high crime area (R. p. 20, l. 30). Nothing was said to the arrestees about purse-snatching and the officers saw no activity on the part of anyone in the car which could actually appear to be snatching a purse from anybody (R. p. 20, ll. 23-24). Additionally, nothing was said to the arrestees about driving too slowly (R. p. 21, ll. 1-6).

Although this was the month of February, at about 9 o'clock at night (R. p. 21, ll. 16-17), the driver obligingly had on a shirt with sleeves rolled up. With the help of a flashlight (R. p. 22, ll. 20-27), the officer was able to see a single mark (l. 27) on the arm of the driver. The arresting officers immediately placed the driver, one Banks, under arrest and lined the two females and Appellant up against a building (R. p. 23, ll. 26-30). Prior to the time the officers ordered appellant out of the vehicle, they had not seen him in violation of any law, felony or misdemeanor (R. p. 24, ll. 29-32). Thereafter, as stated on redirect examination, the officers noticed that "his eyes were pinpointed and glassy" (R. p. 25, ll. 4-6). They asked him whether he used narcotics, and he obligingly answered in the affirmative (R. p. 24, ll. 10-18). The officer then ordered appellant to roll up his sleeves, whereupon they saw "scar tissue and discoloration on the inside of his right arm, and numerous fresh needle marks on the inside of his left arm and also a fresh scab" (R. p. 24, ll. 19-29). In the arrest report, read into the record by Counsel for Appellant, it appeared that the officers checked the suspect's arm prior to the alleged admission (R. p. 26, ll. 16-29).

At this point Counsel for Appellant objected to the introduction of incriminating evidence on the ground that there was no probable cause for the search. The Court overruled this objection.

The People thereupon called the investigating officer who testified that, in his opinion, the marks and scabs on the arms of Appellant indicated that "a narcotic w[illegible] injected into the vein" (R. p. 58, l. 25). Thereupon, over Appellant's objection, the witness was permitted to testify as to admissions purportedly made by Appellant that he had had his "last fix on Wednesday night." On cross-examination, the "expert" stated that at no time did he witness any withdrawal symptoms in Mr. Robinson (R. p. 62, ll. 13-16). As a matter of fact, he wasn't under the influence at the time of the interview by the expert, so that he saw no influence and no withdrawal (R. p. 62, l. 18). Furthermore, at no time was it shown even by admissions, at what place the narcotics were allegedly injected by appellant.

Appellant, on his behalf, personally testified and presented his mother and the young lady who was with him at the time of his arrest, all of them in substance denying appellant was an addict or had ever used narcotics, and denying that any admissions of such conduct had been made at any time. The marks on his body, which were generally in evidence and not only on his arms, were stated to be a holdover from his military service, apparently caused by overseas shots.

The Court thereupon instructed the jury, who in due course returned a verdict of guilty as charged. At the time set for sentencing, appellant, by his Counsel, made an oral motion for new trial specifying all grounds herein specified as questions for review. The Court denied dismissal or a new trial, whereupon appeal was taken to the Appellate Department of the Superior Court.

In the said appeal, the said grounds were again raised in appellant's Opening Brief, wherein it was clearly speci-

fied that both federal and state constitutional objections were taken. Upon the Appellate Department's affirmance of the conviction, in the briefs presented on Habeas Corpus to the District Court of Appeal and the California Supreme Court it was argued that Section 11,721 of the Health and Safety Code denies petitioner's right under state and federal constitutions, to due process and to equal protection of the laws, on the ground stated as point "A" of the questions here presented for review.

ARGUMENT

Introduction

On the 1st day of September of this year there passed into history the infamous vagrancy laws which have existed almost since California has been a state. On that date AB 874, passed by the last session of the California legislature and signed into law by the Governor, became effective. As reported in the California Press, the Governor, in signing the bill, said that "the vagrancy laws have been made both *more constitutional* and more likely to lead to conviction when the justifications exist." (Emphasis here and elsewhere added.)

One editorial writer continued:

"Under the new law a vagrant must do something which amounts to disorderly conduct, such as loitering in a public place and refusing to identify himself or tell the police why he is there, and police must have a logical reason for demanding identification.

"The new law lays the principle that men cannot be thrown in jail or run out of the county because the enforcement officers do not like their looks or dress. It under-

writes the principle that in America a man has to commit an actual crime before breaking the law. It hits pre-censorship.

"While it may be subject to abuse it will give the judge who honors the Bill of Rights a weapon to check local pushing around of anyone."

"This bill is a big step forward in modernizing California law," the Governor said. "Our vagrancy laws were, without doubt, the most often abused and at the same time the most difficult ones with which to obtain a conviction in court.

"Under the O'Connell bill," we are saying, "It is what a man does, not who or where he is that defines the crime."

The Governor said the new law "will make it possible for the police in California to make valid arrests to protect the public from vagrants who live on the fringes of our society."

"At the same time," he said, "the new law scrupulously respects constitutional rights."

There will now remain punishable as a condition or status, under California law, only the addiction to narcotics which is herein sought to be held unconstitutional. This Counsel had long argued that the vagrancy laws were unconstitutional in their criminalization of status or condition. Ironically, addiction was first criminalized as one aspect of the crime of vagrancy, being first enacted as subsection 12 of section 647 of the Penal Code as follows:

> "Every person who is a drug addict, provided that a drug addict within the meaning of this section is any person who habitually takes or otherwise uses narcotics, and such taking or using is such as to en-

> danger the public morals or health or safety or welfare, or who is so far addicted to the use of such narcotics as to have lost the power of self control with reference to his addiction . . . is a vagrant."

The 1939 amendment deleted subdivision 12. At the same time stats. 1939, c. 1079, p. 3003, added sections 11,720-11,722 to the Health and Safety Code, dealing with narcotic addicts. The substance of the omitted subdivisions was incorporated into the Health and Safety Code sections.

The remedy which we here seek would delete, at least, the addiction phase of section 11,721, without doing violence to the acts of use or being under the influence of a narcotic, as such, and would free the statute books of California of the last remaining vestige of the crime of vagrancy.

The italicized language quoted from the Governor indicates the questionable status of the crime of status, however long it may have remained on California's statute books throughout the history of the state. A law is either valid or invalid, not more or less constitutional.

In "Narcotic Addiction," Report to Attorney General Edmund G. Brown (1954) by the Citizens Advisory Committee to the Attorney General on Crime Prevention, it is stated:

> "Narcotic addiction is fundamentally a problem in mental hygiene. It is *primarily a psycho-biological illness,* and only secondarily, is it a legal or criminal problem. The legal, criminal problem arises as a result of existing laws and as a consequence of the fact that it is necessary for addicts to resort to crime in order to secure money for the drugs. The general philosophy therefore should be that the management

of narcotics ought to be oriented in the direction of *social rehabilitation and not that of punishment.* P. 31."

That the highest state court to which appeal lies of right has similar constitutional misgivings which should be settled and determined by our highest court is suggested by the memorandum opinion of the Appellate Department on appeal below:

> "We are not unmindful that the Supreme Court, in In re Newbern (1960), 53 C. 2d 786, held that Penal Code 647.11, which made it a misdemeanor to be a common drunkard, was so vague and uncertain that it was unconstitutional. This might cause the higher courts to review the crime of being a narcotic addict or any crime of status. Although at present no appeal lies from the appellate department of the Superior Court to the District Court of Appeal or the Supreme Court, yet habeas corpus lies to test the constitutionality of the section in question. We would welcome such a test."

Points and Authorities

A. Section 11,721 of the Health and Safety Code Denies Appellant's Right, Under the 14th Amendment of the United States Constitution, to Due Process and to Equal Protection of the Laws in That:

(1) *The Said Statute Punishes a Status, Not an Act or Omission.*

It is a time-honored proposition that the existence of a crime requires two essential elements. One is external, consisting in an act or omission prohibited by the criminal law and technically referred to as the body of the crime or corpus delicti. The other is internal, and is generally

referred to as criminal intent, guilty knowledge or intent, or mens rea. 14 Cal. Jur. 2d: Criminal Law, Sec. 3, p. 183, citing Penal Code, Sec. 20.

Recently the California Supreme Court has reaffirmed the efficacy of Section 20 of the Penal Code which provides that "in every crime or public offense there must exist a union, or joint operation of *act* and *intent*, or criminal negligence." Overruling a long line of precedents to the contrary, it was held in *People* v. *Vogel*, 46 C. 2d 798, 299 P. 2d 850 (1956) that wrongful intent is an essential element of crime (bigamy in the cited case) even though the state statute is silent on the matter. The statute presently before the court, in its punishment of addiction, criminalizes a status where neither act nor intent is present.

That Federal constitutional law is concerned with the substance and procedure of State law is now clear. See *Lambert* v. *California*, 355 U.S. 225; *Smith* v. *California*, 361 U.S. 147; *Thompson* v. *City of Louisville*, 362 U.S. 199; and *Griffin* v. *Illinois*, 351 U.S. 12.

Certain language of *Lambert* v. *California*, *supra*, as reported in 14 Am. Jur., Criminal Law, Sec. 22 (Pocket Supp.) would seem to be equally applicable to crimes of status:

> "While a vicious will is not always a necessity to constitute a crime and conduct alone without regard to the intent of the doer is often sufficient, there being a wide latitude on the part of the law makers to exclude in the declaring of an offense, elements of knowledge and diligence from their definition, this is not so where the offense consists in a mere failure to register, a conduct which is *wholly passive* and unlike the *commission of acts* or the *failure to act* under circumstances that should alert the doer to the consequences of his deed."

So too the case of *Lanzetta* v. *New Jersey*, 306 U.S. 451, while the court's concern is principally with the lack of clarity, impliedly lends support to our attack upon the criminalization of status:

> "A statute penalizing 'gangsters' and declaring that 'any persons engaged in an unlawful occupation known to be a member of any gang consisting of two or more persons, who has been convicted on at least three times of being disorderly person, or who has been convicted of any crime, is a gangster' is so vague and uncertain in its definition of the offense as to be repugnant to the due process clause of the Fourteenth Amendment."

In some jurisdictions the legislatures have sought to reach by statute a class of undesirable persons against whom it is most difficult to obtain direct evidence of guilt of crime by making ill repute a substantive offense. The validity of such statutes, however, has been frequently denied upon the ground that constitutional provisions have been violated. *Peo.* v. *Belcastro*, 356 Ill. 144, 190 N.E. 301, 92 A.L.R. 1223. Anno.: 92 A.L.R. 1228; L.R.A. 1917 F. 904.

A statute making subject to conviction as vagabonds all persons reputed to be habitual violators of the criminal laws of the state or United States or habitually to carry specified weapons or to act as associates, companions, or bodyguards of persons reputed to be habitual violators of the criminal laws operates to deprive such persons of their liberty without due process of law in violation of the Federal and State Constitutions. *Peo.* v. *Belcastro*, 356 Ill. 144, 190 N.E. 301, 92 A.L.R. 1223.

To punish a person for a condition or status is to incriminate him vaguely as "bad," "immoral," or "lewd." *Lanzetta* v. *New Jersey, supra.*

(2) *The Statute Punishes an Involuntary Status.*

It is elementary constitutional law that Due Process and Equal Protection clauses require reasonableness in legislation and proper classification. U. S. Constitution, 14th Amendment; California Constitution, Art. I, Sec. 13.

Police regulations must be reasonable and free of oppression. *Sing Lee, Ex Parte*, 96 C. 354, 31 P. 245.

A classification which rests on no reasonable basis and which bears no substantial relation to a legitimate purpose to be accomplished is purely arbitrary and patently discriminatory. *Loff* v. *Long Beach*, 153 C.A. 2d 174, 314 P. 2d 518.

There is most serious constitutional question as to whether status as such may be punished. Be that as it may, intrinsic in criminal law is the proposition that there must be some volitional act or conscious omission before a party may be properly charged with crime; thus crime, by definition, must include such volition. As we shall elaborate under the next subheading, we can conceive of no condition known to man which, in itself, is more compulsive, hence less voluntary, than the status of addiction to drugs, which section 11,721 purports to criminalize.

Whatever argument may be made in favor of punishing a status of a voluntary nature (as that of gangster and some classes of vagrants, perhaps), it is both inhumane and a violation of the constitutional requirement of reasonableness in classification to punish an involuntary status. This is not simply a matter of legislative discretion or policy, but a question of limitations upon legislative acts. This principle is stated in Corpus Juris Secundum, Criminal Law, Sec. 13: "The legislatures of the several states have the inherent power to prohibit and punish any act as a crime, *provided they do not violate the re-*

strictions of the state and federal constitutions." Legislative power is properly limited by constitutional provisions as interpreted by the courts.

(3) *It Punishes a Condition of Mental and Physical Illness.*

There are at least three possible approaches by government to the admitted problem of addiction: (1) to let it alone or ignore it; (2) to treat it; or (3) to punish it.

The first suggested approach was taken in this country, generally, until the Harrison Narcotic Act, 1914. Prior to that date, government largely left the addict to the physician, who, we suggest, is better able to cope with him than is the policeman and jailer. This fact is stated in "Narcotic Addiction," a Report to Attorney General Edmund G. Brown (1954) by the Citizens Advisory Committee to the Attorney General on Crime Prevention, as follows (p. 14):

> "It is estimated that there were 400,000 Opium users in the United States in 1882 and these consumed 5,000,000,000 grains annually. Morphine was frequently and legally dispensed at retail counters. It was further estimated that by 1909 the imports of Opium reached 628,177 pounds annually as contrasted with a medical need of not more than 50,000 pounds. Our current legal import of Opium to the United States averages 350,000 pounds annually for a population of over 155,000,000 persons.
>
> "By 1914 the situation came to a head when the Harrison Narcotic Act was passed and in looking at the national situation in retrospect, we might say that the addiction problem had become so serious that the Harrison Narcotic Act was passed, but actually that was not the fact. The act was *not aimed at controlling*

> *addiction—basically it was a revenue act.* Indirectly, however, the act brought narcotics under control in 1914 at a time when it was estimated that there were from 150,000 to 200,000 addicted persons in the United States."

It is notable that, even to this day, the federal laws, while providing up to 20 years for dealing in narcotics, does not punish the addiction of the victim of the traffic.

Counsel has made the most extensive research of this problem, and ventures to say that nowhere else in the world is addiction punished as such (except in a small minority of American States). At one time in Russia, the use of tobacco (another narcotic) was punishable with death. This was soon abandoned as unrealistic, unenforceable, and inhuman. The renowned German physician hereinbelow quoted, had to argue, almost apologetically, for even forced treatment of the condition as an illness detrimental to the welfare of the group.

For the immediately following portion of this brief, we rely upon "Laws Controlling Illicit Narcotics Traffic," 84th Congress, 2d Session (1956), Document No. 120, presented by Senator Price Daniel (this was the report which led to legislation greatly increasing the punishment of narcotics *dealers*):

In eight states (Indiana, New Hampshire, New Jersey, Ohio, South Carolina, South Dakota, Utah, and West Virginia) there is no statutory provisions governing the commitment or treatment (medically or criminally) of drug addicts.

Only a small minority of states *punish* addiction (California, Connecticut, Kentucky, Louisiana, Michigan, New Jersey, Texas, Utah, Washington, and Wisconsin), and

all but four of these provide for treatment as well as punishment.

The vast majority of the states provide only for treatment of the addict, while punishing the pusher or dealer. The Uniform Narcotic Drug Act, as approved and adopted (1932) by the National Conference of Commissioners on Uniform State Laws, nowhere defines addiction as a crime, nor punishes it as such. (Summary of State and D.C. Legislation Relating to the Treatment of Drug Addiction—Part V of the Daniel Report—based on a study prepared by Samuel H. Still, American Law Division of the Library of Congress, for the Council of State Governments in 1953.)

To be a narcotics addict is not a criminal offense under Federal law, which merely defines the term in order to provide for the commitment of addicts to Federal *hospitals for treatment on a voluntary basis,* or prescribes confinement of certain addicts convicted of other Federal violations. Emphasis is now being given to the need for uniform compulsory *treatment* legislation. *Id.,* p. 45.

The treatment approach, which we urge is the only reasonable governmental conduct toward the addict, is well summarized in the report of the Attorney General (New York), Legislative Document 1952, no. 27:

> "The problem cannot be solved simply by the enactment of more stringent legislation aimed at preventing illegal traffic in narcotics. . . . When analyzed, it will be seen that the regulatory and corrective phases are patently interrelated. In the peculiar nature of the problem a step taken toward cure of the user, and removal of the hopeless addict, is a move toward curbing the use of narcotics. Not only is the user or addict removed as a source of business for the peddler, but,

> of even greater importance, he will cease to exist as a spreader of the disease . . . recommendations are . . . First, the steps designed to cut away the cancerous traffic. Secondly, the means of treatment and rehabilitation aimed at curing or removing the drug user, both for his own good and as a potential menace. Finally, the education of our citizenry. . . .
>
> "The proceedings must not be made criminal in nature and the commitment, for want of a better term, does not assume the character of punishment for an illegal act. The aftercare, although in the nature of parole, must similarly be mandatory, even though in no sense criminal."

In addition to the requirement that legislation must be reasonable, it must also be "reasonably restricted to the evil with which it is said to deal." *Butler* v. *Michigan*, 352 U.S. 380.

The court may take judicial notice that the criminalization of addiction has in no way tended to decrease the narcotics traffic, the only purported basis for government interference in this connection. On the contrary, while cruelly punishing and increasing the suffering of the addict, it has actually tended to increase narcotics addiction. This fact is recognized in "Narcotic Addiction," *supra*, at p. 36:

> The consensus of experts heard was almost unanimous that *the punitive approach to the narcotic problem has been a failure.* Case histories studied, together with the recidivist records of convicted addicts who have served sentences for addiction, show that very few remain free of addiction for any appreciable period of time following release from incarceration. . . . Insofar as the basic problem of addiction is concerned, it would appear that stiffer penalties

result in brushing the problem "under the carpet"; the problem remains in spite of our complacency in wearing "blinders."

That narcotics addiction is a status of mental and physical illness is a matter of universal definition:

> "In addition to habituation, the narcotics also produce addiction—an *uncontrollable* desire for always repeated doses of that particular substance, which simply cannot be curbed by reasoning. This symptom is hard to explain. Theories have been advanced of a 'hunger of the tissues for the poison'; the influence of a physiological vital function has been suspected, the existence of a certain poison level, *without which these functions can no longer take place* . . . we see a vicious circle, which can give us a good idea of the tremendous inner restlessness which compels the morphine addict to take the alkaloid again and again. Thus we can understand the menacing symptoms which appear when an addict is suddenly deprived of morphine. The consequences, delirium, fits of frenzy and collapse, give ample proof of the over-stimulation of a body accustomed to morphine, which eventually becomes unable to conserve a certain psychological and physical equilibrium without the aid of the opiate." Hesse, *Op. Cit.*, p. 14.

That the requirement of reasonableness prevents the legislature from delving, at all, into some circumstances and conditions of man is suggested by the following extract from 12 Am. Jur., Constitutional Law, Sec. 483, p. 160, n. 20:

> "Apart from the question of the exactness or inexactness of classification attempted by the legislature is the important fundamental problem as to whether the

> legislature had authority to deal with the subject at which the legislation was aimed. This qualification is of utmost importance and must be kept in mind in any case. If the legislature has no authority to deal with the subject at which measures are aimed, a classification, however logical, appropriate, or scientific, will not be sustained."

In a word, the legislature, like other departments, has its powers limited and circumscribed; therefore, though an intent to contravene the constitution will not be imputed, still, whenever the constitutional limitations are actually violated, to that extent the act of the legislature is void. 11 Cal. Jur., 2d Constitutional Law, Sec. 75, p. 410, n. 6, citing *Pepper* v. *Broderick*, 123 C. 456, 56 P. 53; *Forestier* v. *Johnson*, 164 C. 24, 127 P. 156.

Even in those areas of law in which the legislature may express its power, it is clear that there must be a "substantial relationship between the statute's end and means." *Cities Service Gas Co.* v. *Peerless Oil*, 340 U.S. 179, 186.

It is our position that the combinative effect of the above cited constitutional principles, while not preventing legislative action with respect to narcotic addicts, does prevent criminal treatment of them. The question is, simply: May the legislature punish as a crime a mental and physical illness? That such is the proper definition of addiction the court may take judicial notice from unanimous medical and scientific treatment of the subject. To assist in such judicial notice, may we present the following excerpts from *Narcotics and Drug Addiction* (1946) by Erich Hesse, M.D., noted German physician:

> "The facts show that the morphine molecule possesses a combination of paralyzing and stimulating properties; the latter manifest themselves in morphine

addicts, whenever their bodies do not receive a fresh dose of alkaloid, the only thing able to counteract and soothe the permanent excitation of their nervous systems which is the direct consequence of their continual indulgence in morphine. These symptoms, called 'abstinence phenomena,' are a direct *threat to the life of an addict,* for they indicate the imminent danger of a collapse of the circulatory system. They must be *avoided at all costs.*" *Id.,* pp. 39, 40.

Thus the condition of addiction not only is one of illness, involuntary, but the compulsive use of narcotics becomes the only way to prevent serious physical illness and suffering, collapse, even death:

"But such voluntary escape from the clutches of the poison is *no longer possible* once a real addict has developed. In this stage the alkaloid is the only thing capable of keeping the morphonist in a bearable physical and mental condition. If the morphine level in the blood and in the tissues sinks, the abstinence phenomena will set in. The addict becomes irritable, moody, depressed, and once again he will reach for the syringe in order to escape from this unpleasant state. . . . His mind is dominated by only one thought, the desire for morphine, the yearning for the toxin which alone is capable of *making his life bearable.* His will power is limited and the autistic attitude of the addict projects in the direction of the alkaloid exclusively." *Op. Cit.,* pp. 43, 44. (Emphasis here and elsewhere added.)

"The cells no longer cease their physiological functions under the influence of high concentration of morphine; in fact the presence of sufficient quantities of morphine *become an absolute necessity for them.*

> When the organism is deprived of the alkaloid, it immediately reacts by producing abstinence symptoms. State of exaltation, manic fits, cramps and serious circulatory disturbances *endanger the life of the addict.*" *Id.*, p. 45.

The criminal punishment of addiction is further unreasonable in that it penalizes a condition or status which would, in many instances, negative guilt of substantive crimes under the principle that "where insanity or unconsciousness is produced by intoxication, and where a specific mental state is an element of the crime charged," the party is incapable of committing a crime. *Peo.* v. *Baker*, 42 C. 2d 550, 268 P. 2d 705. Section 11,721 punishes the "insanity or unconsciousness" or semi-unconsciousness, as such.

That addiction is in fact insanity and that certain other criminal acts may be compulsively or irresponsibly caused by the said insanity is suggested by Hesse:

> "There begins the transition to the marantic stage. A decrease of intelligence, periods of moodiness, delusions, lack of self-confidence, negligence of duties, moral aberration, and finally acute *mental derangement*, in the form of acute psychoses, may set in. . . . The human wrecks not infrequently put an end to their lives with their own hands." *Op. Cit.* pp. 43, 44.

In this situation, the legislature can, even must, act; but the constitutional requirements of Due Process and Equal Protection require reasonable action. Such action must be medical or psychiatric, not punitive.

To penalize the condition of addiction as such is about as advanced as the burning at the stake of "witches" (insane persons) during colonial days. Many social prob-

lems may not be solved by penal sanctions, in the nature of things. The type of "treatment" administered by police departments and jailers can only aggravate the mental and physical aberration known as addiction—hence, this approach is unreasonable, in the light of modern medical knowledge, of which the courts may, even must, take notice.

The type of action which the legislature may take in this situation has in fact been taken in the Communicable Disease Prevention and Control sections of the Health and Safety Code (Secs. 3001, et ff.). Therein, notably in the case of venereal disease, compulsory medical treatment is provided for, with criminal sanctions only being applied for a wilful failure to cooperate in the prevention and control of the malady.

The German laws have already taken the approach suggested here, even under the "police state" of the Hitler regime. The pertinent sections of the German Civil Code provide that legal insanity includes the degeneration of character of the morphine addict (the very thing that Sec. 11721 penalizes as a status). Hesse, p. 49. Apparently, even under that rigid regime, however, addiction had not been taken cognizance of either as a criminal or a health measure. We incorporate the author's suggestion of the proper legislative approach:

> "In order to extirpate the evil of morphinism, it has been repeatedly recommended that addicts be subjected to compulsory dehabituation treatments. (NOTE: No penal sanctions *ab initio*. The author feels that even compulsory health treatment must be argued for:) The justification of this hinges on the question: Has a man the right to destroy his own body by poisons? No member of the national community has this right. . . . This principle justifies compulsory dehabituation treatments, to last until the care of the

morphonist is guaranteed. It is another question whether he should be kept in an institution for an indefinite time after his complete recovery, too." *Id.*, p. 47.

We suggest that our constitutional provisions prevent treatment of sickness as a crime, and that the striking down of such a statute by the courts will result in the passage of legislation along the lines hereinabove suggested, which would be reasonable and constitutional, additionally to the fact that it might lead to some real control of the rising problem of narcotics, which has gotten out of hand during our misguided period of attempted penalization of private moral conduct.

(4) *It Is Vague, Indefinite and Uncertain.*

It is elementary that clarity in language is required by the Due Process Clause of the Federal and State constitutions. We submit that lack of such clarity occurs in the instant legislation, in that it is not clearly set forth what is meant by the three crucial terms, "use," "be addicted to," or "be under the influence of." Thus, Webster's New International Dictionary gives several meanings to "use", one of which means to use upon a single occasion, whereas another equally standard meaning means to use habitually or customarily. Arguably, the legislature may have only intended to incriminate the *customary* use (as distinguished from the *compulsory* use suggested by "addicted"). This, however, does not clearly appear; so that it would be equally arguable that the legislature intended to prohibit a single use. The courts have, to be sure, read in the word "single," but this we submit is judicial legislation. Because of such lack of clarity, we urge that the ordinance does not pass the constitutional test.

By the same token, one would necessarily wonder from the wording of the statute what degree of influence the legislature had in mind, since a very small amount of a narcotic will affect only certain parts of the anatomy, in a very negligible manner, whereas larger amounts will cause the loss of self-control and even death.

Finally and importantly, under this head, there is such uncertainty as to the meaning of addict that we submit that the instruction given on this subject on the trial below, which will be discussed *infra,* is contrary to the medically accepted definition which it was obviously the intent of the legislature to import into the statute.

We submit that the definition of addict or addiction, derived from the case of *Peo.* v. *Thompson,* 301 P. 2d 313, 314, 315, 144 C.A. 2d Supp. 845 is erroneous, and that the court in the *Thompson* appeal did not mean to define addiction for the purpose of jury instructions. The instruction given by the court is inconsistent with definitions by the legislature throughout the codes which show addiction to mean not merely a frequent or habitual use, but a compulsive use over which the individual has no control.

For a definition of addiction we say turn, logically, to the medical profession:

> "Drug addiction may be defined as a state in which a person has *lost the power of self-control* with reference to a drug, and abuses the drug to such an extent that the person or society is harmed. It should be noted that addiction implies a *compulsive* and repetitious use of the drug, and that the harm done the user varies with the degree of personality disorder which characterizes the addict. In addition, one

> or more of the following related but distinct phenomena are always present: 1. Tolerance. 2. Physical dependence with resulting abstinence illness when the drug is withheld. 3. Habituation or emotional dependence." *Narcotics and Narcotic Addiction,* by David W. Maurer, Ph.D. and Victor N. Vogel, M.D. (1954), p. 27.

Addict (as noun): "A person who has acquired the habit of using spirituous liquors or narcotics to such an extent as to deprive him of reasonable self-control." 1 C.J.S., p. 1453, citing *Interdiction of Gasquet,* 85 So. 844, 147 La. 722.

Words and Phrases: "Under statute authorizing suspension of license of physician who is addicted to use of narcotic drugs, addicted is not a word of art and means excessive or intemperate use of, and license of physician who daily *required* inordinate supplies of narcotic drugs was properly suspended though there was not direct proof of deterioration." *Palmer* v. *Spaulding,* 87 N.E. 2d 301, 302, 299 N.Y. 368.

The legislature in constituting drug addiction of physician as ground for forfeiture or suspension of his license to practice medicine had in mind *pernicious consequences* accompanying abuse of narcotic drugs and employed statutory phrase "addicted to the use" in such sense. *Application of Palmer,* 87 N.Y.S. 2d 655, 658, 275 App. Div. 5.

The California legislature has clearly indicated its definition of "drug addict," or "narcotic drug addict," in Section 5250 of the Welfare and Institution Code: "Any person who, to the extent of having lost the power of self-control, habitually takes or otherwise uses opium, morphine,

cocaine, or any other narcotic drug as defined in the Health and Safety Code." We submit that somewhat less was required by the instructions given in the instant case than that a person should have lost the power of self-control to drugs involved.

Thus, it may be seen that reasonable minds differ as to the meaning of "addict."

Due Process of law in legislation also requires definiteness, or certainty; a vague or uncertain statute does not meet the requirements of due process. Hence, if an act of the legislature is so incomplete, vague, indefinite, or uncertain that men of common intelligence must necessarily guess at its meaning and as to its application, it denies due process of law. 16A, C.J.S., Constitutional Law, Sec. 569(5), p. 584, nn. 28, 29, citing *Wolfe* v. *U.S.*, 149 P. 2d 391; *Cline* v. *Frink Dairy Co.*, 47 S. Ct. 681, 274 U.S. 445, 71 L. Ed. 1146; *Ward* v. *Auctioneer's Ass'n of Southern Cal.*, 153 P. 2d 765, 67 C.A. 2d 183, *cert. den.*, 325 U.S. 874, 89 L. Ed. 1992, 65 S. Ct. 1555; *Conally* v. *General Construction Co.*, 46 S. Ct. 126, 269 U.S. 385, 70 L. Ed. 322.

(5) *Double Jeopardy Is Inherent in a Crime of Status.*

Section 13 of Article I of the California Constitution is a mandate against double jeopardy.

In an article entitled Criminal Law and Administration, in the 1960 Annual Survey of American Law, *New York University Law Review*, Professor Gerhard O. W. Mueller states, on the subject of Double Jeopardy:

> "Likewise unsatisfactory in this field is the continued attribution of distinct sovereignty to municipalities so as to permit double prosecution by state and municipality. California deserves commendation for

> re-evaluating its state pre-emption policy, with the result that the clearly duplicitous Los Angeles felon registration ordinance was held unconstitutional, thus eliminating one cause of double jeopardy prosecutions. Indeed, there is no cause to believe that the many city ordinances, parroting state law, will increase the deterrent effect of state law. They are nothing but double jeopardy traps."

So also is a crime of status a "double jeopardy trap." Here, although we are faced with a single State Law, each municipality or locality is given power to punish the addict for his single, continuing status, even though his presence in a given area may have no connection with his use of the drug, and may be for the purpose of obtaining employment or medical care, or similar worthwhile purpose. When we consider the ruling that, once established, the status is *presumed* to continue, it may be seen that an addict may be a thousand times punished for his single condition.

(6) *The Statute Is an Unwarranted and Unconstitutional Infringement on Freedom of Movement.*

By the same token, the freedom of movement inherent in the American democracy is denied to citizens for the reason that they are mentally and physically ill. This is done by the statute's punishment of mere appearance in the County, City, or State of a narcotic addict, without evidence of his committing any forbidden act, even the injection of narcotics, while in the state.

The right to move freely within the United States is an incident of national citizenship protected against interference by the privileges and immunities clause of the Fourteenth Amendment. *Edwards* v. *California*, 314 U.S. 160, 178-186. Even before the Fourteenth Amendment was

enacted, this right of locomotion throughout the nation was held to be a right of national citizenship. *Crandall* v. *Nevada*, 6 Wall. 35. "It is plain," said Mr. Justice Douglas, "that the right of free ingress and egress rises to a higher constitutional dignity than that afforded by state citizenship." *Edwards* v. *California, supra,* at p. 181 (concurring opinion).

Undoubtedly the right of locomotion, the right to move from place to place according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution. *Williams* v. *Fears*, 179 U.S. 270, 274.

Justice Douglas noted in *Edwards* that State interference with freedom of movement which would prevent a citizen, because he was seeking new horizons would deprive him of that freedom of opportunity which is ours by virtue of the guarantee of liberty in the Fourteenth Amendment. May we properly deprive the addict who may enter our state or a subdivision thereof on business, or perhaps for medical treatment, of the said freedom of movement by a criminal prosecution for his condition?

(7) *It Is Ex Post Facto.*

Section 11,721 punishes the status of addiction whether or not acquired before passage of the said statute and whether or not it was innocently or medically acquired, as, for example, during application of narcotics to a soldier suffering from malaria or other tropic disease contracted as a casualty in the service of his country. In view of the fact that the sale and use of narcotics has been made illegal in the lifetime of perhaps most people living, cer-

tainly of many, and especially in view of the very recent criminalization of the status of addiction as such, many people who acquired this incurable habit before such legislation have by it been made automatic criminals upon migration to this state.

An *ex post facto* law is one which makes criminal and punishes an act (or status?) which was done before the passage of the law and which was innocent when done. *Peo.* v. *Edenburg,* 263 P. 897, 88 C.A. 558.

Section 10 of Article I of the United States Constitution prohibits the enactment of such laws by the States.

(8) *It Imposes Cruel and Unusual Punishment.*

The Eighth Amendment to the federal Constitution and Art. I, Sec. 6 of the California Constitution both prohibit cruel and unusual punishment.

A penalty is cruel when it shocks the moral sense and outrages those innate principles of humanity which have been broadened and expanded by civilized enlightenment. *Finley, In re,* 1 C.A. 198, 81 P. 104; *United States* v. *Rosenberg,* 195 F. 2d 583.

While it is normally for the legislature to define crimes and fix punishment that may be inflicted, courts may denounce the punishment as unusual if it is "out of all proportion to the offense, and is beyond question an extraordinary penalty for a crime of ordinary gravity committed under ordinary circumstances." *Finley, In re, supra.*

The Due Process clause of the Fourteenth Amendment prohibits a state from executing sentence in a cruel manner. *Louisiana, ex rel. Francis* v. *Resweber,* 329 U.S. 459, 91 L. Ed. 422, 67 S. Ct. 374.

The term cruel and unusual punishments "when it first found place in the federal Bill of Rights, meant not a fine or imprisonment or both, but such punishment as that inflicted by the whipping-post, the pillory, burning at the stake, breaking on the wheel, and the like; or quartering the culprit, cutting off his nose, ears or limbs, or strangling him to death. It was such severe, cruel and unusual punishments as disgraced the civilization of former ages and made one shudder with horror to read them." *O'Shea, In re,* 11 C.A. 568, 105 P. 776.

In view of modern medical knowledge of the nature of addiction, we submit that the punishment thereof, at all, and especially the application of the violent, unmedicated withdrawal, is a modern example of the burning of witches at the stake, the criminal prosecution of illness, and as such is inherently a case of cruel, unusual, inhumane, and unnatural punishment.

The criminal treatment of addiction, as legislated and as applied in California, imposes upon appellant (or others similarly situated) intense mental and physical torment and suffering, via "cold turkey" withdrawal method. This approach, often leading to collapse or death, offends the sense of justice inherent in the concept of Due Process. Whether we treat these unfortunate victims of our collective failure to take the profit out of narcotics dealing and to educate the populace at an early enough age as to the nature of addiction and the harms inherent in the use of drugs, as criminals or as the sick people they are, a minimum constitutional requirement would seem to incorporate the suggestions of Hesse, *supra*: "As regards the treatment of morphonists, the dehabituation treatment is the only way of curing the addict. . . . The dehabituation can be done abruptly or gradually . . . suppressing any

abstinence symptoms by a continuous-sleep treatment. Hospitalization is recommended."

Maurer and Vogel (p. 75, *Op. Cit.*) concur:

> "Complete recovery requires from three to six months, with rehabilitation and, if needed, psychiatric treatment. The withdrawal syndrome is self-limiting and most addicts will *survive* it with no medical assistance whatever (this is known as kicking the habit 'cold turkey'). Abrupt withdrawal is *inhuman,* but with the development of such drugs as methadone, it is possible to reduce the distress of withdrawal very considerably.
>
> "In no event is the illness to be taken lightly, and allowing addicts to go through it unassisted in jails or prisons is not only unnecessarily brutal, but may endanger the life of the individual; certainly some assistance is desirable if the individual is to have any hope of staying off drugs once he is withdrawn. . . . The fear of withdrawal distress is undoubtedly one of the very strong factors in sustaining addiction and eventually apparently supersedes the desire for pleasure which the addict originally felt on taking opiates."

Due process of law precludes defining, and thereby confining the standards required of states in their criminal prosecutions more precisely than to say that prosecutions cannot be brought about by methods that offend a "sense of justice." *Rochin* v. *California,* 342 U.S. 165, 92 L. Ed. 183, 72 S. Ct. 205, 25 A.L.R. 2d 1396; *Foster* v. *Illinois,* 332 U.S. 134, 21 L. Ed. 1955, 67 S. Ct. 1716.

B. Procedural Due Process of Law Was Denied by the Introduction of Evidence Obtained Through Unreasonable Search and Seizure and Self-Incrimination, Materially Affecting the Rights of Defendant, Under the 14th Amendment.

Much of the fine language, in our basic governmental documents, regarding respect for the rights of the individual, those things which are said to be the essence of democracy, are rendered nugatory in practice because the executive branch of government, through its police officers, who number in the thousands throughout the country, has apparently taken the attitude that constitutional rights apply only to the other two branches of government, the legislative and the judicial. In this momentous period of history, in which two world systems are competing for the loyalty of their own citizens and for the support of nations beyond their borders, it is well for America to take an adult and honest view of its failures as well as of its successes. We may not successfully hide our own recognition of the defects in our system by propaganda or otherwise, and even less may we expect to win friends and influence people abroad by an ostrich-in-the-sand approach to the negative aspects of our socio-economic-political system.

One of the areas in which America is failing is in its approach to crime and vice. This failure is due to at least two causes:

(1) As we have attempted to do in our economy, we have simply let nature take its course, with the result that we have both chronic unemployment and chronic crime and vice. Without getting into an economic argument, may we advance at this time the thought that the solution of crime and vice will require an affirmative action of a more

scientific and fundamental sort than the not time-honored but time-outmoded concept of "throw the culprits in jail!" In an enlightened age such as that which we tell ourselves we live in, we submit that some of our scientific knowledge should be applied to the eradication of the causes for crime and vice. Very little of that has been or is being done.

(2) We have over-legislated in connection with acts which we choose to call criminal, the most glaring examples which come immediately to mind being the criminalization of the status of homosexuality and of narcotics addiction. In these areas, our approach is as unscientific and benighted as was the burning of witches at Salem in an era of ignorance of the real cause of mental disease. We are relatively ignorant of the cause and cure of the mental or physical defects of homosexuality and of narcotics addiction, so that we now burn these two classes at the stake by applying to them the peculiar processes of local police action. This Counsel submits that penalization of such conditions, and many others which would be best removed entirely from the criminal field, can only serve to aggravate the problem, and thereby individual and social confusion resulting therefrom.

Against the background of this thinking, assuming it to be valid, to remove the constitutional protections against unlawful search and seizure, by legislative or judicial action, can serve no valid social function, since the end result will not be to correct evils which can only be corrected by other than police action in the first place. Although most of our thought and attention, in this area, is directed to the pros and cons of legislative attempts to override the constitutional decisions of *Cahan* and *Priestley*, just as surely may the courts, in individual cases,

override the salutary principles of these cases by simply closing their eyes to the facts.

In the instant case, we re-submit no probable cause for stopping of the vehicle containing the defendant and three others was shown by the prosecution. Since it was admitted that there was no warrant of arrest or search, and since it is well established that upon the absence of such it becomes the burden of the People to affirmatively show probable cause other than by judicial predetermination through the issuance of a warrant, the mere statement that the arrest was made for a traffic violation would seem hardly sufficient.

Much illumination is thrown on the reasons for the arrest of the defendant by the admission, on cross-examination, of the arresting officer of page 23 of the Record, lines 4 through 7:

> "Q. Now, your reason for stopping him was, eventually, the lack of rear view illumination; is that right? A. And the fact that he was driving slowly on a dark, unlit street, yes."

It is apparent, on the face of the case, that, whatever the facts may have been as to the absence of rear license plate illumination, this was only a pretext for the actual arrest of the parties in the car, which included the defendant, and three others. It is simply unreasonable to believe that the initial stopping of the vehicle and its occupants was for the said purpose. First of all, the arresting officers were not traffic officers and were not in a traffic car and not dressed in uniform. We have a provision in the vehicle code which was intended to govern traffic arrests which says that every traffic officer shall wear full distinctive uniform and be in a car distinctly marked. Sec. 40800, Vehicle Code.

It was not stated that a traffic citation was in fact issued, or that the officers even had a traffic book upon which such citations could be written. The only possible conclusion, therefor, would be that this was either an afterthought or at most a pretext, and not the real reason at all for the stopping and search of the vehicle. Again, assuming that this was the reason for the stopping, rather than the rather obvious desires of the police to engage in a speculative detention and search, then the officers should have limited themselves to the procedures specifically set out for traffic arrests, which do not permit of general search and seizure unless the arrestee refuses to sign the ticket, agreeing to appear in court.

The search of the vehicle and of its occupants and the interrogation of the occupants which led to alleged admissions and discovery of addiction, by prolonging a traffic arrest, would not be authorized. Clearly, a traffic officer has no right to make a general arrest and search or interrogation, when the stopping of the citizen is purportedly for a traffic violation. One case which throws some light on this subject is the following:

Since a postal inspector has no authority to make an arrest, he has no authority to make search or seizure. *U.S.* v. *Hellock*, 76 F. S. 985.

The Vehicle Code outlines the procedure to be followed in traffic arrests, and these procedures do not permit of a general arrest or search. The provision is to the effect that an arresting officer must prepare, in triplicate, an order to appear in court and he is limited to that. In the instant case, the officers went beyond the limitations imposed on them by the legislature.

That defendant was lawfully under arrest for a traffic violation did not make lawful a search and seizure, without

warrant, not based on probable cause. *Peo.* v. *Zeigler,* 100 N.W. 2d (Mich.) 456 (1960).

Proof of confession is never admissible unless shown to have been made voluntarily, and the burden of proof is on the People to show that it was. *Id.*

A lawful traffic arrest does not by itself authorize a contemporaneous search of the automobile as a matter of routine public policy. *Id.*

A search of a taxicab cannot be justified on the grounds that the cab driver might be arrested for double parking since the search would have no relation to the traffic violation or be a reasonable incident to an arrest therefor. *People* v. *Blodgett,* 46 Cal. 2d ——.

Next, in straining to justify the obviously wrongful arrest of defendant, the officers mentioned something about the reputation of the general neighborhood for purse snatching.

It developed on cross-examination however that the whole of the division in which the officers served (if not, indeed, the whole of the city) might be considered a high purse snatching, or high crime, area; so that the theory of the officers would permit the stopping, interrogation, and search of anybody that they chose anywhere in the City, certainly anywhere in the Wilshire District. Something more reasonable than the general stopping of citizens is obviously required by the *Cahan* Rule.

The doctrine that the constitution does not prohibit search and seizure as an incident of a lawful arrest may not be used as a pretext to search for evidence nor does it justify a general exploratory search of the premises and an unlawful arrest cannot justify a search and seizure as an incident thereof. 79 C.J.S., Searches and Seizures, Sec. 26, p. 796, nn. 20, 21, 22.

To be sure the authority to search for the fruits or the means of the offense as an incident to the lawful arrest, like all prerogatives based on reason, is susceptible to oppressive abuse. The authority must be confined to narrow limits and utmost good faith exacted. Courts must exercise care lest we unwittingly sanction an evidential exploration under the guise of a declared legitimate purpose. *Harris* v. *U.S.*, 151 F. 2d 837, 840.

The constitutional provisions prohibiting unreasonable searches and seizures apply to a search of the person. *Id.*, Sec. 11, p. 789, n. 85, citing:

The people's right, recognized by the Fourth Amendment, to be secure in their persons, house, papers, and effects against unreasonable searches and seizures was originally designed principally to protect a citizen in his home from arrest or seizure of his papers and goods therefrom but immunity from search and seizure without lawful warrant has been extented to unlawful seizure of persons not in their homes. *City of Price* v. *Jaynes,* 191 P. 2d 606, 113 Utah 89.

Persons lawfully within the United States are entitled to use public highways and have a right to free passage thereon without arrest without warrant. *Allen* v. *State,* 183 Wis. 323, 197 N.W. 808, 39 A.L.R. 782.

See also *Peo.* v. *Stein,* 265 Mich. 610, 251 N.W. 788, 92 A.L.R. 481, holding that even though one is violating the law in the presence of officers, they are not justified in arresting him without warrant where they were not aware of such violation until the search was made after his arrest.

See also *Hughes* v. *State,* 145 Tenn. 544, 238 S.W. 588, 20 A.L.R. 639, where the court stated that the *facts* constituting the offense must have been within the knowledge

of the officer and that knowledge must have been revealed in the officer's presence.

Probable cause for making an arrest without a warrant may not be inferred by the officer who made it from the fact that the person arrested did not protest his arrest, did not at once assert his innocence, and silently obeyed a command to proceed to the police station. 4 Am. Jur., Arrest, Sec. 48, p. 31, n. 14.5, citing *U.S.* v. *Dike*, 332 U.S. 581, 92 L. Ed. 210, 68 S. Ct. 222.

The position of the trial court that the fact that co-arrestee Banks was shown to be a narcotics user would justify the search of the others in the car as well as of the vehicle does not seem to be supported by the cases:

Mere presence of defendant in another person's apartment would not justify his arrest and search, unless officers were justified in arresting such other person and reasonably mistook defendant for him. *Peo.* v. *Kitchens*, 294 P. 2d 17, 146 C. 2d 260.

It may be further observed that the alleged admissions of defendant-appellant related to past narcotic activity and not at all to any present involvement therein. Since he did not admit addiction but only "chippying" some time in the past, it may not be said that we have an admission even of a present status since "chippying" alone does not create the condition of addiction, but is by definition the absence thereof.

Persons lawfully within the United States are entitled to use the public highways and have a right to free passage thereon without interruption or search, unless a public officer authorized to search knows of probable cause for believing that the vehicle is carrying contraband or that its occupants have violated some law. 44 Cal. Jur. 2d,

Searches and Seizures, Sec. 25, p. 309, n. 15, citing *Wirin* v. *Horrall*, 85 C.A. 2d 497, 113 P. 2d 470.

When it appears that search and not the arrest is the real object of the officers in entering on the premises and the arrest is a pretext for, or at the most an incident of, the search, the search is not reasonable within the meaning of the Fourth Amendment. 79 C.J.S., Searches and Seizures, Sec. 67, p. 840, n. 73, citing *Henderson* v. *U.S.*, 12 F. 2d 528.

Where an officer, when making the arrest, did not know that the keg which defendant was carrying contained liquor and was not in possession of facts showing commission of misdemeanor, arrest was unlawful. 6 C.J.S., Arrest, Sec. 6, p. 598, n. 92, citing *Patton* v. *State*, 135 So. 352, 160 Miss. 274.

By the admissions contained in the People's own arrest report (Transcript, pages 24 and 25), it clearly appears that the arrest of the instant defendant, which began with an order that he get out of the vehicle, was solely in keeping with an exploratory search of his person, in that all the alleged evidence of narcotics use at all occurred after he was thus arrested, and placed under the jurisdiction of the police. The admissions upon which the police strongly rely in this case, occurred after the arrest and the search of the person of this appellant. The attitude of the police in their search is illuminated by testimony of the People's witness with respect to a similar search of the other arrestees at the scene (R. 22, ll. 21-26):

> "Q. Were you particularly looking for marks? A. I shined my light about his person. I look for anything. Not particularly marks, no.
>
> Q. For anything you might find? A. Yes.
>
> Q. And you happened to see the marks standing out there? A. That is correct."

Finally, under this head, we might point out that the defendant is a person aggrieved by the unlawful arrest of his co-arrestee, and could object to any evidence resulting therefrom which had adverse effect upon our instant defendant. This is the holding of a number of cases, notably *Peo.* v. *Colonna,* 140 C.A. 2d 705, wherein it was held that defendant could raise an objection although he was not an occupier. The same would obviously apply to invasion of the person as well as to a violation of the close.

Under the rule in *Mapp* v. *Ohio,* 367 U.S. 421, the right to a trial free of evidence unlawfully obtained has been declared federally protected. It would seem, therefore, that this Court is not bound to follow state decisions, which either deny the right to exclusion or which fall short of a minimum standard of the newly designated federal rights.

Under such minimal standard, we submit that the evidence—uncontradicted and viewed in the light most favorable to the appellee—shows a clear violation of the said rights of this appellant. We do not expect this Court to dissolve conflicts in evidence in this regard. We do urge that the uncontradicted portions of the evidence clearly support our position in this connection.

C. Procedural Due Process of Law Was Denied by a Conviction Totally Devoid of Evidentiary Support.

(1) *There Was No Evidence Whatsoever of Either Influence of a Narcotic or Addiction to a Narcotic.*

The rule which we here invoke has been stated by this Court in the case of *Thompson* v. *City of Louisville,* 362 U.S. 199. Here again, we do not rely upon the Court's determination of conflicts in evidence, but submit our case upon that view of the evidence most favorable to the appellee, under the usual approach in this regard.

Obviously, the presence of scar tissue of itself is no evidence whatsoever of present addiction. Without more, the most that it can be said to show is past addiction. The only satisfactory evidence of addiction would be something to show the compulsive use thereof, and the best available, if not only, evidence thereof would be the presence of withdrawal symptoms. Even Nalline, which may show present influence of the drug or its presence in the body, gives no indication of the fact of addiction. The fact that addiction itself is hard to prove should not permit us to let hard cases make bad law.

The only evidence, in fact, of scar tissue is on page 53 of the transcript, at which point the police officer not qualifying as an expert stated that he had seen "scar tissue and discoloration" on the inside of the right arm. The expert, on the other hand (page 58 and following), testified to individual scabs.

It is apparent from his testimony and from the photographs which required magnification before the jury could even be satisfied that there was any evidence at all, that only a few needle marks, widely scattered are involved in the instant case. This, then, is not the ordinary case wherein a confirmed addict is brought before the bar of justice. In fact, in summing up his impressions and opinions, the expert (R. 58, l. 25) stated simply that "a narcotic" was injected into the vein. This, then, was the People's case in chief, in a word. On cross-examination (R. 62), the following testimony was introduced:

> "Q. And at no time did you witness any withdrawal symptoms in Mr. Robinson? A. No, I did not.
>
> Q. As a matter of fact, he wasn't under the influence at the time you interviewed at all? A. No, he wasn't.
>
> Q. So you saw no influence and withdrawal? A. That is correct."

Furthermore, on page 84 of the Record, it appears that the People themselves contended only that they had proven use:

> "The Court: So that we may understand a little more clearly what Counsel has in mind, or perhaps the Court may have in mind, I understand, Mr. Gage, that you are not contending the defendant was under the influence of narcotics at the time of the arrest?
>
> Mr. Gage: No, I don't think we can establish that.
>
> The Court: I mention that because, apparently, Mr. McMorris has proceeded on some theory in that connection, and I do not intend to instruct the jury on it because I agree with Mr. Gage. The people have not made out a case, and I will instruct the jury by stating what the charge is; and failing to set forth that, therefore they will not gather that he is charged with that aspect of it. In other words, Mr. Gage, you are proceeding on the theory that he is addicted to the use of narcotics and that he unlawfully uses narcotics.
>
> Mr. Gage: Yes, sir. However, primarily, on the question of use itself."

The only evidence, other than that of the expert, offered by the People was in connection with probable cause for arrest, with the arresting officer attempting to show that he had a right to arrest appellant for a crime in his presence.

Under this head, may we make this observation: That the officer arrested this appellant because of marks that he found as a result of an unlawful search and arrest. Secondly, such marks, standing alone, could not prove the commission of a crime in the presence of an officer. This is true because such marks could indicate the use of a narcotic

in a jurisdiction beyond that of the officer's authority, and above all indicate a completed crime, not a crime in the presence of the officer. This, then, is a further reason why we urge that the arrest of the appellant was unlawful.

Since there were no withdrawal symptoms or indicia of influence of the drug, the only possible crime of which there was evidence was that of use somewhere at some time in the past, and in no event in the presence of the arresting officer.

(2) *The Only Conceivable Evidence of Venue Was by Admission of the Defendant and Not as a Part of the Corpus Delicti.*

The only evidence educed by the People in support of the requirement that venue be proven appears on page 60 of the Record. There, after the prosecuting witness stated that appellant admitted using heroin in a gas station at 54th and Central Avenue, upon a leading question by the prosecuting attorney, the witness added (as an afterthought?) that the location was "indicated" to be in Los Angeles. Aside from the fact that the word "indicated" would only imply a conclusion on the part of the testifying witness, we further submit that venue must be proven as a part of the corpus delicti and not by admission.

Sufficient proof of the venue is necessary in every criminal case. *People* v. *Pollock*, 26 Cal. App. 2d 602, 80 P. 2d 106.

It is an elementary principle of our jurisprudence that the question of jurisdiction over the subject matter can never be waived nor conferred by consent. It seems quite clear to us, that, from the standpoint of logic, the question of jurisdiction, whether it be local or general jurisdiction, is fundamentally and necessarily a question of fact, and

that in a criminal case, the burden of proving that fact rests on the prosecution. . . . Where this fact is not proved, the verdict is contrary to the evidence within subdivision 6 of section 1181 of the Penal Code and a new trial may be granted. *People* v. *Megladdery,* 40 Cal. App. 2d 748, 106 P. 2d 84.

In view of the cited legal principles, this Court may well hold in the language of *People* v. *Garcia,* 266 P. 2d 233, 234:

> "However, we are unable to find in the record any evidence of the venue of the offense. Viewing the evidence in the light most favorable to the judgment, it may be said to have been proved that the scars, scabs, and discolorations observed by the doctor and testified to by the defendant had been brought to the condition observed by the doctor within 12 to 24 hours of the arrest and physical examination, but there is no evidence whatever that this use of the narcotic occurred in San Diego County, state, or country."

(3) *There Was No Proof of the Use of an Illegal Narcotic.*

In the complaint, it was specifically alleged that appellant had used an illegal narcotic. As juries are constantly instructed, allegation in a complaint is not proof. Unless it be so, we have no proof of the use of heroin in this case, again except by admissions following objections that the corpus delicti had not been established. Clearly, the proof of the corpus delicti of the use of *heroin,* not just any narcotic, would have to be accomplished before admissions of the use of heroin could fill the void. In section 11,001 of the Health and Safety Code narcotics are defined. From the standpoint of clarity and the right to prior information as to the specific crime alleged, it is necessary to plead one

or more of the listed narcotics. In other words, we submit that to simply allege addiction to narcotics in the abstract would be insufficient under our rules of constitutional law and criminal pleading. Be that as it may, once alleged, it is the duty of the state to prove the specific allegation. The only testimony of the expert witness was that "some narcotic" had been injected into the vein of the appellant, as previously pointed out in this brief. We submit that such was insufficient to comply with the requirement that the proof meet the pleading, so there was a fatal variance, or a fatal defect or lack of proof, as to an essential allegation.

Even if the jury chose not to believe the uncontradicted explanation by defendant and his mother of the presence throughout his body of certain marks, a holdover from his military service, although such marks were in fact general and not just in the crook of his arm, there is no evidence whatsoever that the marks were made by a specific narcotic.

Summary and Conclusion

Nowhere have we found much of what we have here contended for better summarized than in the words of *Maurer* and *Vogel, supra*:

> "During the last quarter of the 19th century and the first quarter of the 20th century, there was much controversy over whether drug addiction was a *disease or a vice,* and inhumane treatment often given addicts —extending even into the present time—reflects the attitude of the public and law enforcement officers that narcotic addiction is a vice from which the addict can be broken if he is treated severely enough. However, by about 1925 the medical profession, as a result of much discussion in the medical journals and in the

medical societies, generally accepted the theory that a drug addict is a sick person, and that addiction per se does not mean that the individual is necessarily either vicious or criminal.

"However, the federal law at present, for all practical purposes, makes it a crime to be a narcotic addict, and some of the rather severe state laws being sponsored currently seem to ignore more enlightened medical opinion and revert to the punitive action as the sole treatment for addiction—confinement to jail or prison. Many private physicians and medical organizations have taken little active interest in the present near-hysteria over drug addiction, despite the fact that most medical men recognize that a drug addict is usually *sick first* and possibly a criminal second, and that he should receive medical treatment the same as a victim of syphilis who *may have violated the law* in acquiring the *disease*.

"Most courts feel that society can go only so far in trying to outlaw either habit-forming laxatives or phony dentifrices, even to protect the uninformed individual. The answers to these problems are educational rather than legal." *Id.*, p. 25.

We submit that the criminal prosecution of the mental and physical illness that is addiction transcends considerations of right or wrong legislative policy, and is governed by the constitutional provisions requiring reasonable classification and reasonable relationship between object and means, and those forbidding cruel and unusual punishment and interference with the privilege and immunity of free ingress and egress among the several states.

Finally, we submit that the inherent violence and horror in the untreated withdrawal of narcotics, necessarily a

part of our present punitive approach, is such a complete absence of humanity and of medical and psychiatric knowledge of modern civilization as to offend a sense of justice (*Rochin* v. *California*, 342 U.S. 165), and that therefore the punitive approach is beyond the limited powers of the legislature.

May we conclude with this language from the editorial section of the Prison Journal published in April, 1936, in connection with the Criminal Registration Law:

> "We are utterly opposed to the . . . law in principle because we believe, with some competent authorities, that it is unconstitutional. A more important objecjection, perhaps, than this, is the psychic effect which it has on every man who has committed a crime. It opens up old sores. It reaffirms the conviction which exists in the minds of too many of these people that the police are anxious to get something on them. . . .
>
> "We are prone to forget that voluntary association and cooperation are fundamental principles of democracy. Any departure from these principles in lawmaking invites resistance, and strikes at the roots of democracy."

Wherefore, we respectfully submit that the state legislation herein involved should be held unconstitutional, and that the conviction of appellant should be reversed.

Respectfully submitted,

SAMUEL CARTER MCMORRIS
Attorney for Appellant

APPENDIX

Penal Code of the State of California, Section 647:

1. Every person (except a California Indian) without visible means of living who has the physical ability to work, and who does not seek employment, nor labor when employment is offered to him; or,

2. Every beggar who solicits alms as a business, or

3. Every person who roams about from place to place without any lawful business; or,

4. Every person known to be a pickpocket, thief, burglar, or confidence operator, either by his own confession, or by his having been convicted of any of such offenses, and having no visible or lawful means of support, when found loitering around any steamboat landing, railroad depot, banking institution, broker's office, place of amusement, auction room, store, shop or crowded thoroughfare, car, or omnibus, or any public gathering or assembly; or

5. Every lewd or dissolute person, or every person who loiters in or about public toilets in public parks; or,

6. Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business; or

7. Every person who lodges in any barn, shed, shop, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof; or,

8. Every person who lives in and about houses of ill-fame; or,

9. Every person who acts as a runner or capper for attorneys in and about police courts or city prisons; or

10. Every common prostitute; or

11. Every common drunkard; or,

12. Every person who is a drug addict; provided, that a drug addict within the meaning of this section, is any person who habitually takes or otherwise uses narcotics, except that when such user of narcotics is suffering from an incurable disease or an accident or injury and to whom such narcotics are furnished, prescribed or administered in good faith and in the course of his professional practice by a physician duly licensed in this state and who is in attendance upon such user of narcotics, such person shall not be held to be a drug addict within the meaning of this section (1931 Amendment).

Amended by Stats. 1939, ch. 1078, Sec. 1, p. 3002, omitting subd. 12 (Deerings California Codes, Annotated, 1961, Legislative History to Sec. 647).

Now Sec. 647 provides that any person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(a) Soliciting or engaging in lewd or dissolute conduct in any public place or in any place open to public view;

(b) Soliciting or engaging in acts of prostitution;

(c) Begging alms;

(d) Loitering about any toilet open to the public to engage in or solicit lewd or unlawful acts;

(e) Loitering or wandering on the streets without apparent reason and refusing to give proper identification when requested by any peace officer, if the circumstances would indicate to a reasonable man that the public safety demands such identification;

(f) Being in a public place under the influence of intoxicating liquor, or drugs, in such a condition that he cannot care for his own safety or that of others, or because of his condition he interferes with the free use of any street, sidewalk or pubic way;

(g) Loitering or prowling on the property of another in the nighttime without visible or lawful business with

the owner or occupant, or while doing such an act, peeking in the door or window of any inhabited building or structure thereon;

(h) Lodging in any building or place, whether public or private, without permission.

New Sec. 647 in contrast to its predecessor penalizes *acts* and not *status* or *condition*. This change would seem to eliminate the constitutional problems (Journal of the State Bar of California, vol. 36, p. 802).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.
No. 554

LAWRENCE ROBINSON,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

BRIEF OF APPELLEE.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

The statute is not "ex post facto," particularly as to appellant who makes no claim that it has been so applied to him.

Section 11721 does not impose cruel or unusual punishment within the long understood meaning of the term.

Appellant was not subjected to unreasonable search and seizure. Rather, any search of appellant was incident to a lawful arrest under California's statutes and judicial declaration of the exclusionary rule. California's enforcement of the exclusionary rule affords defendants the protection of the Fourteenth and Fourth Amendments under *Mapp v. Ohio.*

The judgment is supported by the evidence.

STATUTES

TEXTBOOKS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.
No. 554

LAWRENCE ROBINSON,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

BRIEF OF APPELLEE.

Reference to Official Reports.

This is a direct appeal from a final judgment entered March 31, 1961, by the Appellate Department of the Superior Court of the State of California, for the County of Los Angeles.

The opinion of the court is not reported. It appears at page 111 of Transcript of the Record in this appeal and a copy is appended hereto (Appendix A).

Statutes Involved in the Case.

The statutes involved in the case in the order of their consideration in the brief, are:

Section 11721 of the California Health and Safety Code (Appendix B);

Section 5350 of the California Welfare and Institutions Code (Appendix C);

Section 23105 of the California Vehicle Code (Appendix D);

Section 24250 of the California Vehicle Code (Appendix E);

Section 24601 of the California Vehicle Code (Appendix F);

Section 40800 of the California Vehicle Code (Appendix G);

Section 625 of the California Vehicle Code (Appendix H);

Section 11500 of the California Health and Safety Code (Appendix I);

Section 836 of the California Penal Code (Appendix J).

Statement of the Case.

Appellant was charged in a verified complaint, filed in the Municipal Court of the Los Angeles Judicial District, with having committed, on February 4, 1960, a violation of Section 11721 of the Health and Safety Code of the State of California, a misdemeanor. The statute reads as follows:

"No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county

jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail." (As amended California Statutes of 1957, c. 1064, p. 2343, Sec. 1.)

Appellant was duly arraigned, entered a plea of not guilty and requested a jury trial. The cause was tried in the Municipal Court, Los Angeles Judicial District. The prosecution's case was presented as follows:

Lawrence E. Brown, a police officer of the City of Los Angeles, testified that on February 4, 1960, at approximately 9 P.M., he observed a Nash automobile southbound on Serrano Street between 12th Street and 12th Place traveling at approximately 10 to 15 miles per hour [Tr. 16]. The vehicle had no rear license plate illumination and the officer was unable to read the license number. The officer pulled up to the automobile, whereupon it stopped and a Mr. Charles Banks, the driver, alighted from the vehicle. Mr. Charles Banks had his sleeves rolled up above the elbow and the officer observed that on the inside of his left arm at the crook of the elbow he had what appeared to be a fresh needle mark [Tr. 17].

Then to a question concerning the appearance of *appellant's* arms, appellant interposed an objection raising the reasonableness and legality of the "arrest"; in effect, putting the prosecution to its burden of establishing that the evidence about to be introduced was

not obtained by an illegal search and seizure, California having adopted the exclusionary rule of illegally obtained evidence, *People v. Cahan* (1955), 44 Cal. 2d 434, 282 P. 2d 905. Such being a matter of law only *(People v. Gorg* (1955), 45 Cal. 2d 776, 291 P. 2d 469), the jury retired from the courtroom and the trial of this issue continued before the court [Tr. 18].

It was established that the officers did not have a search warrant [Tr. 18].

When the car was pulled over by the officers, Mr. Brooks was not ordered out of the car but got out voluntarily [Tr. 22] and met Officer Brown at a point between the two vehicles [Tr. 23]. Officer Brown (having seen the needle mark) spoke to Mr. Banks, who stated he used narcotics and had used them a short time prior to the time the officers stopped him, some matter of days [Tr. 20]. Mr. Brooks was then arrested and Officer Brown's partner, Officer Wapato, got the other three parties, two females and appellant Robinson, out of the vehicle and lined them up abreast of each other in front of a building. Officer Brown cursorily searched appellant for offensive weapons [Tr. 23]; finding none he then questioned appellant regarding his nervous condition and asked him if he used narcotics. Appellant answered "Yes, I use narcotics" and further stated that he wasn't hooked, that he hadn't used narcotics in approximately two months, that his friends came by his house and he used their narcotics, their outfits; that he had never bought narcotics. He then stated that he hadn't used narcotics in two weeks [Tr. 24].

Officer Brown then asked to look at appellant's arms and ordered him to take off his coat and roll up the

sleeves of his shirt. Officer Brown then saw scar tissue and discoloration on the inside of appellant's right arm and numerous fresh needle marks on the inside of his left arm and also a fresh scab [Tr. 24]. Appellant was nervous and perspiring and his eyes were pinpointed and glassy on examination by a flashlight and in comparison with Officer Wapato's eyes [Tr. 25].

Following defense testimony on the issue, the court found that the police had not engaged in any illegal search or seizure [Tr. 40-43, 49-52], whereupon the jury was brought in and the trial on the merits proceeded [Tr. 52].

Officer Lawrence E. Brown resumed the stand and testified that he examined appellant's arms and observed that he had scar tissue and discoloration on the inside of the right arm. On the left arm he had what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow on the inside of the arm [Tr. 53].

Theodore M. Lundquist, called as a witness on behalf of the People, testified that he was a police officer for the City of Los Angeles and had been attached to the Narcotics Division of the Los Angeles Police Department for approximately eleven years [Tr. 54]. He was duly qualified as an expert in the field of narcotics addiction [Tr. 54-56], and further testified that on February 5, 1960, at approximately 10:15 A.M., he examined appellant's arms. In the area of the inner right elbow there were two scabs over a vein. In the area of the inner left elbow there was discoloration over a vein bearing five scabs, and further down the forearm, approaching the wrist and following the vein coursing toward the outer arm from the inner side

to the outer side of the arm, there was multi-discoloration [Tr. 56]. It was the opinion of Officer Lundquist that said marks and the discoloration were the result of the injection of unsterile hypodermic needles into the vein and that a narcotic was injected into the vein [Tr. 58]. Also, that the scabs appearing on the inner right elbow area were estimated to be approximately ten to fifteen days old and the scabbing appearing in the inner left area was estimated to be approximately three to ten days old [Tr. 59].

In a conversation with Officer Lundquist regarding the use of drugs, appellant stated that he had begun using narcotics approximately four months prior, that he had vomited after his first fix and that he still vomited after the injection of a narcotic if he had eaten beforehand. He had been using cottons given to him about three or four times a week and had started using powder about two months prior. He had his last fix on Wednesday night (a week previous) when he and a friend split an eight-dollar bag at a gas station at 54th and Central Avenue in the City of Los Angeles. The substance used for the fix had been heroin [Tr. 60-61].

Officer Lundquist testified that these statements made by appellant in connection with the use of drugs were made voluntarily without any promise or threats. He explained that by the use of a "cotton" the impurities are strained from the heroin solution and after it dries it can be resaturated and that liquid used. If it hasn't dried it can be squeezed and the fluid left in the saturated cotton can be used. He further explained that "powder" is the narcotic in the form it is purchased, and before it can be injected it must be put into a liquid form; that an "eight-dollar bag" repre-

sented approximately three grains of the narcotic [Tr. 60-61].

Officer Lawrence Brown resumed the stand and repeated to the jury the statements made by appellant prior to his arrest regarding his use of narcotics [Tr. 64].

Following the defense the court duly instructed the jury [Tr. 86-108]. A verdict of guilty was returned [Tr. 108].

An appeal was taken from the order granting probation and order denying motion for new trial to the Appellate Department of the Superior Court for the County of Los Angeles. Briefs were filed, oral argument presented, and the matter submitted. The orders granting probation and denying motion for new trial were affirmed [Tr. 111-113], and a subsequent petition for rehearing was denied [Tr. 113].

The Appellate Department of the Superior Court in its opinion affirming the order granting probation and order denying motion for new trial invited appellant to test his contentions of unconstitutionality by habeas corpus in the District Court of Appeal and the Supreme Court of the State of California [Tr. 112]. Appellant obliged and sought such writs.

On May 2, 1961, the District Court of Appeal of the State of California, Second Appellate District, denied without opinion the petition for writ of habeas corpus. *(In re Robinson,* 191 A. C. A. No. 3, page 5 of Minutes.) A similar denial occurred on May 29, 1961, when appellant took his petition for writ of habeas corpus to the California Supreme Court. *(In re Robinson,* 56 A. C. No. 1, p. 3 of Minutes.)

Summary of Argument.

California's regulation of the use of dangerous and habit forming drugs under Section 11721 of the Health and Safety Code is a valid exercise of the police power.

Section 11721 of the California Health and Safety Code is not violative of the Fourteenth Amendment merely because it punishes the existence of a *status,* addition to narcotics, rather than an act or omission. Punishment of a status has always been an accepted concept of English and American jurisprudence.

The punishment of such status is not a punishment of an *involuntary* status. It was willfully and voluntarily developed from its inception.

The fact that addicition to narcotics may be a mental and physical illness does not result in constitutional immunity from punishment.

Section 11721 of the California Health and Safety Code is not unconstitutionally vague or indefinite. Rather it gives more than adequate guidance to those who would be law-abiding.

Such statute does not encourage subjection to double jeopardy. Furthermore, appellant has not been so subjected or threatened and is not in a position to raise the issue.

The statute does not restrict constitutional freedom of movement, particularly as to appellant, who again is not so situated as to raise the issue.

ARGUMENT.

I.

Section 11721 of the California Health and Safety Code Is a Proper Exercise of the Police Power.

The regulation of the use of narcotics by the State is clearly a proper exercise of the police power. As stated by this Court in *State of Minnesota ex rel. Whipple v. Martinson* (1920), 256 U. S. 41, 45, 65 L. Ed. 819, 822:

> "There can be no question of the authority of the state in the exercise of its police power, to regulate the administration, sale, prescription, and the use of dangerous and habit forming drugs. . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question."

California courts have repeatedly noted the evils of illegal use of narcotics.

In *In re Hallawell,* 8 Cal. App. 563, 97 Pac. 320, it was stated:

> "The unlawful use of narcotic drugs often tends to moral, mental and physical destruction."

And in *People v. Bill,* 144 Cal. App. 389, 394-395, 35 P. 2d 645:

> "The court will take judicial notice of the fact that the inordinate use of a narcotic drug tends to create an irresistible craving and forms a habit for its continued use until one becomes an addict, and he respects no convention or obligation and will lie, steal, or use any other base means to gratify his passion for the drug, being lost to all considerations of duty or social position."

II.

Section 11721 of the California Health and Safety Code Does Not Violate the Provisions of the Fourteenth Amendment to the United States Constitution.

A. Section 11721 of the California Health and Safety Code Does Not Violate the Fourteenth Amendment to the United States Constitution Because It Punishes a "Status."

Appellant, in contending that Section 11721 of the California Health and Safety Code violates the Fourteenth Amendment to the Constitution of the United States, first argues that it does so because it punishes a status rather than an act or omission.

There is nothing novel about the punishment of a status. The maintenance of an unlawful status falls directly within long accepted definitions of what constitutes crime.

The punishment of a status has always been an accepted concept of English and American jurisprudence, most often appearing in that general field of crime known as vagrancy (See, Blackstone, 4 Commentaries 170, Jones Ed. 1916). And whether a particular category of vagrancy is grounded upon negative action or iterative positive action, it has reference to socially-unacceptable behavior (See, *Commonwealth v. Parker*, 86 Mass. 313, 314).

The question of "status" crimes has appeared in many state court decisions involving vagrancy statutes, wherein vagrancy had been referred to as a "status." For example, a California court, in *People v. Babb*, 103 Cal. App. 2d 326, 328, 229 P. 2d 843, stated:

> "All that is meant by saying vagrancy is a status is that it is a present condition; that the

statute can be applied only to the persons who meet the description at the time the offense was committed."

The court also pointed out, at page 328:

"A general course of conduct, practices, habits, mode of life or status, that is prejudicial to the public welfare may be prohibited by law and punishment imposed therefor. Every course of conduct or practice or habit or mode of life or status which falls within this class of wrongs is connoted by the term 'crime'." (Citing *Bopp v. Clark,* 165 Iowa 697 [147 N. W. 172]. Ann. Cas. 1916E 417, 419, 52 L. R. A. (N. S.) 493, 495.)

Vagrancy statutes "being (statutes) in the exercise of the police power, are generally looked upon as regulatory measures to prevent crime rather than ordinary criminal laws which prohibit and punish certain acts as crimes."

People v. Belcastro (1934), 256 Ill. 144, 148, 190 N. E. 301, 303.

"Society recognizes that vagrancy is a parasitic disease, which, if allowed to spread, will sap the life of that upon which it feeds. To prevent the spread of the disease, the carrier must be reached. In order to discourage and, if possible, to eradicate vagrancy, our Legislature has enacted a statute defining vagrant persons and penalizing them according to its terms. We see no reason why this cannot, or should not, be done as a valid exercise of the police power."

State v. Harlowe (1933), 174 Wash. 227, 233, 24 P. 2d 601, 603.

> "The principle exemplified in . . . vagrancy statutes presupposes a criminal status, not due to the perpetration of a specific offense, presently or in the past, but rather by reason of an intent, sufficiently manifested by overt acts, to commit offenses in futuro. . . ."
>
> *State v. Gaynor*, 119 N. J. L. 582, 587, 197 Atl. 360, 363.

Thus it has repeatedly been held by the state courts that punishment may be imposed for the existence of a status. See also: *People v. Arlington* (1951), 103 Cal. App. 2d 911, 229 P. 2d 495; *Handler v. Denver* (1931), 102 Colo. 53, 77 P. 2d 132; *Commonwealth v. Diamond* (1924), 248 Mass. 511, 143 N. E. 503; *Cox v. State* (1918), 84 Tex. Cr. 49, 205 S. E. 131; *Williams v. State*, 27 Ala. App. 540, 176 So. 312; *Ex parte Oats* (1921), 91 Tex. Cr. 79, 238 S. W. 931; *State v. Susnan* (1943), 216 Minn. 293, 12 N. W. 2d 260). And the federal courts are in accord, as stated by the United States Court of Appeals, District of Columbia, in *District of Columbia v. Hunt* (1947), 163 F. 2d 833, 835:

> "A vagrant is a probable criminal; and the purpose of the statute is to prevent crimes which may likely flow from his mode of life. Hence the statute denounces and makes punishable being in a condition of vagrancy rather than . . . the particulars of conduct enumerated in the statute as evidencing or characterizing such condition."[1]

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[1]For comprehensive treatises on vagrancy and its "status," see:
Prof. Rollin M. Perkins "The Vagrancy Concept," The Hasting Law Journal (University of California), Vol. 9, p. 238 (May 1958);
Forrest W. Lacey "Vagrancy and Other Crimes of Personal Condition," 61 Harvard Law Review 1203.

This statement of the United States Court of Appeals is particularly significant in the light of the part played by narcotics in the crime picture of California.

While Section 11721 of the California Health and Safety Code proscribes three acts (use of, under the influence of, or addicted to, narcotics), the establishment of either being sufficient for conviction, it is the *addition* that constitutes the practical teeth of the section. This because, if the offender is actually apprehended in the act of *using* a narcotic of the character involved in the instant case, he is also apprehended in *possession* of such narcotic, a *felony* in California (Appendix I), and is so charged. As a practical matter, use under Section 11721 is thus established only by admission of the defendant. Although such admissions do occur, the instant case being an example, by the nature of things they are most frequently obtained when the circumstantial evidence of addition is already overwhelming.

The act of being under the influence of narcotics is, by its nature, difficult to prove beyond a reasonable doubt as the act constituting the violation. Taken by itself it can be too easily confused with manifestation of other physical conditions.

It is the proof of addiction by circumstantial evidence, the control of the "probable criminal" (*District of Columbia v. Hunt, supra*) by the tell-tale track of needle marks and scabs over the veins of his arms, that remains the gist of the section.

It appears most significant that in spite of the vigor with which appellant urges that a status as such cannot be constitutionally punished as a crime, he has been unable to cite a single case in which a court has so held.

B. Section 11721 of the California Health and Safety Code Does Not Violate the Fourteenth Amendment to the Constitution of the United States Because it Punishes a Status That Is "Involuntary."

Appellant next argues that the status complained of is *involuntary* in nature. This is preposterous. Certainly that first puncturing of the veins of the body and the shooting into them of that foreign poison was a voluntary act done with knowledge of the probable result. So with the second and third and subsequent injections. The fact that the resultant craving of his addiction may force the addict to resort to theft, robbery and murder to support his expensive habit, does not make such status involuntary. It was voluntary from its inception. A single act of injection does not make a man an addict, it is true, but if he is incarcerated for habitually using the narcotic to the point of addiction, it would be absurd to say his punishment is not because of anything he has *done*.

C. Section 11721 of the California Health and Safety Code Is Not Violative of the Fourteenth Amendment to the Constitution of the United States Because it Punishes "a Condition of Mental and Physical Illness."

Of course it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. So is an alcoholic. So is the arsonist who sets fires for the thrill of the flame the victim of a mental illness, pyromania. The uncontrollable urge of the kleptomaniac to steal makes a thief of an often otherwise respectable person. Yet certainly these crimes must subject their perpetrators to punishment in spite of the fact that they are associated with an illness. In urging that the pun-

ishment of a condition of mental and physical illness violates the Fourteenth Amendment to the United States Constitution appellant cites no judicial authority to support his position.

D. Section 11721 of the California Health and Safety Code Is Not Unconstitutionally Vague or Indefinite.

The terms of the statute attacked as vague and indefinite by appellant are "use," "addicted," and "under the influence of." These are simple words whose meanings should be known to all.

The requirements of reasonable certainty do not preclude the use of ordinary terms to express ideas which find adequate interpretation in common use and understanding.

Sproles v. Binford, 286 U. S. 374, 393, 76 L. Ed. 1167, 1182.

The plain words of a statute must be given the meaning naturally attributable to them.

United States v. Resnick, 299 U. S. 207, 81 L. Ed. 127.

Furthermore, the rule of strict construction of criminal statutes does not require that the narrowest technical meaning be given to the words employed, in disregard of their context, and in frustration of the obvious legislative intent.

United States v. Corbett, 215 U. S. 233, 54 L. Ed. 173;

United States v. Branblett, 348 U. S. 503, 99 L. Ed. 594;

United States v. Turley, 352 U. S. 407, 1 L. Ed. 2d 430.

In determining whether a statute is invalid on the ground of vagueness, the applicable standard is not one of wholly consistent academic definition of abstract terms; it is rather, the practical criterion of *fair notice* to those to whom the statute is directed. The particular context is all important.

> *American Communications Ass'n v. Douds,* 339 U. S. 382, 94 L. Ed. 925.

As stated by Mr. Justice Clark, dissenting in *United States v. Five Gambling Devices, etc.,* 346 U. S. 441, 458, 98 L. Ed. 179, 192:

> "The certainty required by the Due Process Clause is not tested from the would-be violator's standpoint; the test is rather whether adequate guidance is given to those would be law abiding. See *Musser v. Utah,* 333 U. S. 95, 97, 92 L. ed. 562, 565, 68 S. Ct. 397 (1948)."

The statute in question employs words of long usage and well known meanings. Its terms should enable a person honestly seeking to comply with the law to pursue an acceptable course of conduct without undue difficulty.

Appellant urges that the Legislature of the State of California has clearly indicated its definition of "drug addict" and "narcotic addict" and that such definition conflicts with that used by the court in instructing the jury. To support this position he cites Section 5250 of the California Welfare and Institutions Code. He means Section 5350. Such section provides:

> "A 'narcotic drug addict' within the meaning of this article is any person who habitually takes or otherwise uses to the extent of having lost the

power of self-control any opium, morphine, cocaine, or other narcotic drug as defined in Article 1 of Chapter 10 of the Health and Safety Code.

"Whenever in this article the term 'drug addict' is used, such term shall be construed to refer to and mean 'narcotic drug addict' as defined in this section. All persons heretofore committed or admitted as drug addicts to any state hospital, or committed to the Department of Mental Hygiene for placement therein, shall be deemed to have been committed or admitted as narcotic drug addicts. (Stats. 1937, c. 369, p. 1139, sec. 5350, as amended Stats. 1949, c. 1159, p. 2078, sec. 2.)"

A similar contention was before the District Court of Appeal of the State of California in *People v. Kimbley,* 189 Cal. App. 2d 300, 11 Cal. Rptr. 519, a case involving a violation of Section 23105 of the California Vehicle Code (a felony) (Appendix D), which prohibits a person addicted to the use of a narcotic drug driving a vehicle on a highway. The court stated:

"We are not impressed by the argument of defendant that because the Welfare and Institutions Code, in treating of the apprehension and commitment of incompetents in section 5350 defines a 'narcotic drug addict' as 'any person who habitually takes or otherwise uses to the extent of having lost the power of self-control any opium, morphine, cocaine or other narcotic drug as defined in Article 1 of Chapter 1 of Division 10 of the Health and Safety Code' the words 'addicted to the use' in section 23105 of the Vehicle Code should be construed as any person who uses narcotics 'to the extent of having lost the power of self-control.'

> We think the ordinary, dictionary definition of the word 'addicted' is clear and that it should not be distorted by a definition of a 'narcotic drug addict' used by the legislature for an entirely different purpose. . . . We hold that the word 'addicted' as used in the phrase 'addicted to the use' means accustomed or habituated to the use."

Such definition is substantially the same as that contained in the instruction to the jury in the instant case [Tr. 103].

E. Double Jeopardy Is Not Inherent in Section 11721 of the California Health and Safety Code.

Appellant next argues that Section 11721 of the California Health and Safety Code is violative of the Fourteenth Amendment to the United States Constitution because double jeopardy is inherent in a crime of status, and that once the addict has been convicted and the status established he may thereafter be continually punished for his single condition. This of course cannot happen.

It is well settled that, where a continuing offense is charged as having been committed within a stated period, an acquittal or conviction will bar another prosecution of the same offense alleged to have been committed within a period which overlaps any part of the former period.

Short v. United States, 91 F. 2d 614, 620.

Furthermore, appellant has not indicated that he has been subjected to or threatened with double jeopardy.

A litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage.

> *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 289, 66 L. Ed. 239, 243.

The rule is well established that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations.

> *In re Cregler,* 56 A. C. 298, 363 P. 2d 305, citing *United States v. Raines* (1960), 362 U. S. 17, 21-22, 4 L. Ed. 2d 524.

In *United States v. Raines, supra,* it was stated:

> "This court, as is the case with all federal courts, has no jurisdiction to pronounce any statute of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

Moreover, the due process clause of the Fourteenth Amendment does not apply to the states the provisions of the Fifth Amendment to the Constitution of the United States (*Palko v. Connecticut*, 302 U. S. 319, 82 L. Ed. 288; *Bartkus v. Illinois*, 359 U. S. 121, 3 L. Ed. 2d 684.)

F. The Statute in Question Does Not Impose an Unconstitutional Infringement on Freedom of Movement.

Undoubtedly freedom of movement is constitutionally protected (*Edwards v. California*, 314 U. S. 160; 86 L. Ed. 119; *Williams v. Fears*, 179 U. S. 270, 45 L. Ed. 186). However, such freedom is not absolute and is often subject to appropriate regulation (*California v. Thompson*, 311 U. S. 109-116, 75 L. Ed. 1219). Certainly the constitutional protection cannot be tortured to the extent that it must give license to a narcotic addict who by the very propensities of his condition, if uninterrupted, is certain to commit misdemeanors and felonies. To be addicted and use, the addict must necessarily possess narcotics. Such possession is a felony in California (Appendix I). Further, to gain possession he must buy or steal from other felons. This cannot be the kind of "new horizons" Mr. Justice Douglas had in mind in *Edwards v. California, supra*.

Again appellant has failed to establish that the statute in question has been or is about to be applied to his disadvantage in this respect. He has not contended that he is an addict whose freedom of movement has been impaired. Rather, he has denied being an addict at all [Tr. 66].

G. The Statute in Question Is Not "Ex Post Facto."

Appellant urges that the statute in question could be *ex post facto* as to persons who had become lawfully addicted to the use of narcotics prior to its enactment. A similar contention appeared in *Samuels v. McCurdy*, 267 U. S. 188, 69 L. Ed. 568, a case involving the illegal possession of intoxicating liquor acquired prior to the enactment of the statute. This court stated:

> "This is not an ex post facto law. It does not provide a punishment for a past offense. It does not fix a penalty for the owner having become possessed of the liquor. The penalty it imposes is for continuing to possess the liquor after the enactment of the law."

So in the instant case as to addiction to narcotics.

And once again appellant is in the position of seeking consideration of a constitutional question not applicable to him. He does not indicate that he has been subjected to punishment for an addiction commenced prior to the enactment of Section 11721 of the California Health and Safety Code. He denies being an addict at all [Tr. 66].

H. The Statute in Question Does Not Impose Cruel and Unusual Punishment.

Violation of Section 11721 of the California Health and Safety Code results in punishment of not less than 90 days nor more than one year in the county jail. Appellant himself as a result of his conviction was placed on probation for two years subject to certain terms, including 90 days to be served in the county jail [Tr. 6]. Certainly such sentence could not be

considered cruel or unusual (*Weems v. United States,* 217 U. S. 349, 54 L. Ed. 793). Furthermore, the "cruel and unusual" punishment provisions of the Eighth Amendment to the United States Constitution are not made applicable to the states by the Fourteenth Amendment (*Pervear v. Massachusetts,* 5 Wall, 475, 18 L. Ed. 608, *Weems v. United States, supra,* and *Bartkus v. Illinois,* 359 U. S. 121, 124, 3 L. Ed. 2d 684, 687).

III.
Appellant Was Not Subjected to an Illegal Search and Seizure.

As above stated, California adopted the exclusionary rule of illegally obtained evidence in *People v. Cahan* (1955), 44 Cal. 2d 434, 282 P. 2d 905. Appellant's trial was conducted according to such rule and his constitutional guarantees were given all due protection under it.

Without question the police officers had cause to stop the automobile in which appellant was a passenger. It was being operated in violation of Sections 24250 and 24601 of the California Vehicle Code (Appendix E, F), in that after dark the rear license plate was not illuminated. It became the duty of the officers on becoming aware of the violation to stop the vehicle and either warn the violator or issue a citation, and this regardless of the fact that the officers were in a plain unmarked vehicle [Tr. 16] rather than in a distinctively painted vehicle.

Section 40800 of the Vehicle Code of the State of California, as it existed at the time in question, provided:

"Every traffic officer shall wear a full distinctive uniform, and if the officer while so on duty uses a motor vehicle, it must be painted a distinctive color specified by the commissioner.

"This section does not apply to an officer assigned exclusively to the duty of investigating and securing evidence in reference to any theft of a vehicle or failure of a person to stop in the event of an accident or violation of Section 23109 or in reference to any felony charge, or to any officer engaged in serving any warrant when the officer is not engaged in patrolling the highways for the purpose of enforcing the traffic laws. (Stats. 1959, c. 3, p. 1780, sec. 40800.)"

Section 625 of such code as it existed at the time in question, provided:

"A 'traffic officer' is any member of the California Highway Patrol and any peace officer when such member or officer is on duty for the exclusive or main purpose of enforcing the provisions of Division 10 or 11 of this code. (Stats. 1959, c. 3, p. 1639, sec. 626.)"

It is apparent that the officers who arrested appellant were on duty assigned to a "felony unit" [Tr. 16] and were not on duty for the exclusive or main purpose of enforcing Division 10 or 11 of the California Vehicle Code. Furthermore, Division 10 of such code involves and is entitled "Accidents and Accident Reports." Division 11 involves and is entitled "Rules of the Road." Sections 24250 and 24601, the violation of which resulted in the stopping of the vehicle in question, appear in *Division 12* of the California Vehicle Code, which involves and is entitled "Equipment of

Vehicles," and enforcement of such sections is in no way limited by the provisions of Section 40800.

It must be emphasized that no search of any kind occurred as a result of the stopping of this vehicle for the traffic violation [Tr. 23]. The driver, Mr. Banks, voluntarily got out of the vehicle and approached Officer Brown before the officer had even reached the vehicle [Tr. 22-23]. The officer then observed Mr. Banks' arms which were uncovered and exposed to view [Tr. 17].

A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way.

People v. Fitch (1961), 189 Cal. App. 2d 398, 11 Cal. Rptr. 273;

People v. Spicer (1957), 163 Cal. App. 2d 678, 329 P. 2d 917.

A mere looking at that which is open to public view is not a search.

People v. West (1956), 144 Cal. App. 2d 214, 300 P. 2d 729;

People v. Fitch, supra.

Following this observation by Officer Brown, Mr. Banks stated that he used narcotics [Tr. 20]. The officer was thus confronted with a suspect who showed physical evidence of the use of narcotics and who admitted he violated the law in this respect. Certainly such circumstances should give the officer reasonable cause to believe that appellant had committed a public offense in his presence, that is, violation of Section 11721 of the California Health and Safety Code, addiction to the use of narcotics, a misdemeanor (Ap-

pendix B). Additionally, such circumstances constitute probable cause to believe that appellant had committed a felony, possession of narcotics, a violation of Section 11500 of the California Health and Safety Code (Appendix J), as one who uses or is addicted to the use of narcotics must at some time possess them. In this respect the facts are almost identical to those in *People v. Smith* (1956), 141 Cal. App. 2d 399, 296 P. 2d 913. There the officer had stopped for a traffic violation a vehicle in which the appellant was a passenger. The driver was discovered to be a user of narcotics. Appellant having gotting out of the car onto the sidewalk was asked if he was a user of narcotics. He stated that he was. An examination of his arms, determined by the court to be with his consent, disclosed needle marks. The court held these circumstances sufficient grounds for belief that such appellant had committed a felony—possession of narcotics.

In the instant case, as to Mr. Banks, a reasonable belief as to the commission of either the misdemeanor or the felony was grounds for a valid arrest without a warrant under California Penal Code Section 836. Such section provides:

> "A peace officer may make an arrest in obedience to a warrant, or may, without a warrant, arrest a person:
>
> 1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.
>
> 2. When a person arrested has committed a felony, although not in his presence.
>
> 3. Whenever he has reasonable cause to believe that the person to be arrested has committed a

felony, whether or not a felony has in fact been committed. (As amended Stats. 1957, c. 2147, p. 3805, sec. 2)."

Reasonable or probable cause is shown if a man of ordinary care and prudence would be led to believe and concientiously entertain an honest and strong suspicion that the accused is guilty.

People v. Torres (1961), 56 A. C. 882, 366 P. 2d 823;

People v. Ingle (1960), 53 Cal. 2d 407, 348 P. 2d 577.

Therefore, any subsequent search of Mr. Banks or his vehicle was incident to a valid arrest.

A search made incident to a valid arrest is proper.

People v. Torres, supra;

People v. Hammond (1960), 54 Cal. 2d 846, 357 P. 2d 289;

People v. Ingle, supra.

It is proper to search an arrestee's vehicle.

People v. Gale (1956), 46 Cal. 2d 253, 294 P. 2d 13;

People v. Martin (1956), 46 Cal. 2d 106, 108, 293 P. 2d 52;

People v. Blodgett (1956), 46 Cal. 2d 114, 293 P. 2d 57.

Thus it would have been proper to remove appellant and the other two passengers from the vehicle to conduct the search.

Up to this point appellant and the two other passengers had in no way been delayed except as made

necessary by the activities of Mr. Banks. Concededly, appellant by the time he had been removed from the car had done nothing giving rise to any probable cause to arrest him.

Appellant was then searched cursorily for offensive weapons. This was not unreasonable. The driver of the vehicle had already been arrested on a serious charge, a charge that would lead any cautious officer to look to his personal safety.

Where the circumstances appear to warrant it, the police are entitled to ask the person in a car to get out, and where it seems appropriate the police are justified in taking precautionary measures by way of searching for weapons to insure their own safety.

People v. Davis (1961), 188 Cal. App. 2d 718, 10 Cal. Rptr. 610;

People v. Martin (1956), 46 Cal. 2d 106, 293 P. 2d 52.

This particular search for weapons disclosed nothing [Tr. 23, 24]. The officer then questioned appellant regarding his apparent nervous condition [Tr. 24]. This was proper in light of the appearance of appellant's eyes and the arrest of his companion on a narcotics charge. While this may not have constituted probable cause sufficient to justify a search or arrest of appellant, it was sufficient to spur the officer to interrogate him.

The existence of facts constituting probable cause to justify an arrest is not a condition precedent to such an investigation.

People v. Ellsworth (1961), 190 Cal. App. 2d 844, 847, 12 Cal. Rptr. 433;

People v. Blodgett (1956), 46 Cal. 2d 114, 117, 293 P. 2d 57.

The courts of California have consistently adhered to the proposition that a police officer may question a person outdoors at night when the circumstances are such as would indicate to a reasonable man in like position that such a course is necessary to the discharge of his duties.

People v. Ellsworth (1961), 190 Cal. App. 2d 844, 846, 12 Cal. Rptr. 433;

People v. Blodgett (1956), 46 Cal. 2d 114, 117, 293 P. 2d 57;

People v. Murphy (1959), 173 Cal. App. 2d 367, 377, 343 P. 2d 273;

People v. Jackson (1958), 164 Cal. App. 2d 759, 761, 331 P. 2d 63;

People v. Wiley (1958), 162 Cal. App. 2d 836, 839, 329 P. 2d 823;

People v. Ambrose (1957), 155 Cal. App. 2d 513, 521-522, 318 P. 2d 181;

People v. West (1956), 144 Cal. App. 2d 214, 216-219, 300 P. 2d 729;

People v. Jiminez (1956), 143 Cal. App. 2d 671, 673, 300 P. 2d 68;

People v. Jaurequi (1956), 142 Cal. App. 2d 555, 560, 298 P. 2d 896.

Such interrogation does not constitute an arrest even though the person interrogated may be detained momentarily.

People v. Sanchez (1961), 191 Cal. App. 2d 783, 12 Cal. Rptr. 906;

People v. Ellsworth (1961), 190 Cal. App. 2d 844, 12 Cal. Rptr. 433;

People v. Davis (1961), 188 Cal. App. 2d 718, 10 Cal. Rptr. 610;

People v. Michael (1955), 45 Cal. 2d 751, 290 P. 2d 852;

People v. Hood (1957), 149 Cal. App. 2d 836, 309 P. 2d 135;

People v. Martin (1955), 45 Cal. 2d 755, 290 P. 2d 855.

Up to this point appellant had not been arrested nor had he been subjected to a search other than for weapons, and no evidence to be used against him had been revealed.

Upon commencement of the interrogation appellant forthwith stated "Yes, I use narcotics," and further stated that he wasn't hooked, that he hadn't used narcotics in approximately two months, that his friends came by his house and he used their narcotics, their outfits; that he had never bought narcotics and that he hadn't used narcotics in two weeks [Tr. 24].

This statement coupled with appellant's appearance fulfilled the requirements of Section 836 of the California Penal Code for arrest without a warrant by giving the arresting officer reasonable cause to believe that appellant had committed a public offense in his presence by being under the influence of or addicted to the use of narcotics, a misdemeanor under Section 11721 of the California Health and Safety Code. In

that an addict or user must at some time possess, these circumstances also gave the officer reasonable cause to believe that appellant had committed a felony, illegal possession of narcotics under Section 11500 of the California Health and Safety Code (Appendix I) (*People v. Smith, supra*).

While the record does not clearly disclose whether the inspection of appellant's arms was made prior or subsequent to his actual arrest, the order does not affect the validity of the search.

Where an arrest is lawful the search incident thereto is not unlawful merely because it precedes rather than follows the arrest.

People v. Torres (1961), 56 A. C. 882, 366 P. 2d 823;

People v. Hammond (1960), 54 Cal. 2d 846, 557 P. 2d 289;

People v. Ingle (1960), 53 Cal. 2d 407, 348 P. 2d 577.

Thus under the exclusionary rule as adopted and interpreted by the California courts the arresting officer had at hand sufficient facts for a valid arrest and search of appellant. No illegally obtained evidence was introduced against him at his trial.

IV.

California's Exclusionary Rules Do Not Fall Short of Providing the Protection Afforded by the Fourth and Fourteenth Amendments to the United States Constitution.

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081 (1961), has of course brought through the Due Process Clause of the Fourteenth Amendment the protection of the Fourth Amendment to those tried in the state courts. In adopting the exclusionary rule in 1955 in *People v. Cahan, supra,* the California Supreme Court stated:

> ". . . In developing a rule of evidence applicable to the state court, this court is not bound by the decisions that have applied the federal rules, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them. . . . Instead it opens the door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime."

Since *Mapp v. Ohio,* California courts have in *People v. Tyler* (1961), 193 A. C. A. 779, 14 Cal. Rptr. 610, and *People v. Rucker* (1961), 187 A. C. A. 17, 17 Cal. Rptr. 98, stated that there appears to be nothing in the *Mapp* case to indicate that the states are bound to follow the federal requirements of reasonable and probable cause instead of their own.

Though it could be argued that somewhere events of the future might show this statement to be unduly broad, certainly as applied to California's exclusionary rules it is appropriate.

California rules as applied in this case closely parallel the equivalent federal rules.

This court, as to the federal rule on probable cause, stated in *Henry v. United States,* 361 U. S. 98, 4 L. Ed. 2d 134:

> "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."

Such is substantially the same as the California rule expressed in *People v. Torres* (1961), 56 A. C. 882, 366 P. 2d 823 (*supra*), and *People v. Ingle* (1960), 53 Cal. 2d 407, 348 P. 2d 577, *supra.* The *Henry* case is cited as authority in the latter case.

Under the federal exclusionary rule a search made incident to a lawful arrest is proper (*Henry v. United States, supra, Carrol v. United States,* 267 U. S. 132, 69 L. Ed. 543, *United States v. Di Re,* 332 U. S. 581, 92 L. Ed. 210). And in the latter case (*United States v. Di Re*) this court stated that in the absence of an applicable federal statute the law of the state where an arrest without a warrant takes place determines its validity.

Since 1955, California has afforded defendants the protection of the Fourteenth and Fourth Amendments under an exclusionary rule substantially the same as that followed in the federal courts, the decisions of which indeed have been instrumental in the development of the California rule (See *People v. Brown* (1955), 46 Cal. 2d 640, 290 P. 2d 528; *People v. Simon* (1955), 46 Cal. 2d 645, 290 P. 2d 531; *People v. Michael* (1955), 45 Cal. 2d 751, 290 P. 2d 852; *People v. Gorg* (1955), 45 Cal. 2d 776, 291 P. 2d 469; *People v. Martin* (1956), 46 Cal. 2d 106, 293 P. 2d 52; *People v. Gale* (1956), 41 Cal. 2d 253, 294 P. 2d 13).

V.

The Evidence Is Sufficient to Support the Judgment.

Appellant at page 40 of his brief concedes that the case is to be submitted upon the view of the evidence most favorable to the appellee, under the usual approach in this regard.

Recognizing that to convict and punish a man without evidence of his guilt would be a violation of due process of law *(Thompson v. Louisville,* 362 U. S. 199, 4 L. Ed. 2d 654), the evidence introduced against appellant as set out in the statement of the case, *supra,* and viewed in the light most favorable to appellee, clearly established appellant's illegal use of and addiction to narcotics.

On review here of state convictions, all those matters which are termed issues of fact are for conclusive determination by the state courts and are not open for reconsideration by this court. Observance of this restriction in our review of state courts calls for the utmost scruple.

> *Hoag v. New Jersey,* 356 U. S. 464, 2 L. Ed. 2d 913.

As to appellant's contention that the complaint filed against him should have indicated the particular narcotic involved in the commission of the offense, California courts have consistently held that it is proper to plead in the words of the statute. *(People v. Pierce* (1939), 14 Cal. 2d 639, 96 P. 2d 784; *People v. McKenna* (1953), 116 Cal. App. 2d 207, 255 P. 2d 452; *People v. Randazzo* (1957), 48 Cal. 2d 484, 310 P. 2d 413.)

Conclusion.

The judgment of the Appellate Department of the Superior Court for the State of California should be affirmed.

Respectfully submitted,

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WM. E. DORAN,
Deputy City Attorney,

Attorneys for Appellee.

APPENDIX A.

(File endorsement omitted)

In the Appellate Department of the Superior Court
County of Los Angeles, State of California

Superior Court No. CR A 4425

Trial Court No. 114162

People of the State of California, Plaintiff and Respondent,

v.

Lawrence Robinson, Defendant and Appellant.

MEMORANDUM OPINION—

March 31, 1961

Appeal by defendant from order granting probation (referred to as "judgment" in notice of appeal) and order denying motion for new trial, of the Municipal Court of the Los Angeles Judicial District, Kenneth L. Holaday, Judge. Affirmed.

For Appellant—
Samuel C. McMorris, Esq.

For Respondent—
Roger Arnebergh, City Attorney
Philip E. Grey, Assistant City Attorney
William E. Doran, Deputy City Attorney

The defendant was convicted of violating Health and Safety Code Section 11721 which provides: "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics." He appeals from the order granting probation

(referred to as "judgment" in notice of appeal) and order denying a new trial.

Appellant's principal point is that the section, or at least the provision making it a misdemeanor to be addicted to the use of narcotics, is unconstitutional in that it is vague, indefinite and uncertain. It is a crime of status. This court has held in a number of cases that the section is constitutional. In *People v. Bunn* (1959), our CR A 4062, we said: "There is no merit in the claim [of appellant] that Health and Safety Code 11721 is unconstitutional because it makes being a narcotic addict a misdemeanor." To the same effect is *People v. Donlin* (1960) our CR A 4422. We shall, therefore, follow the rule of stare decisis. However, we are not unmindful that the Supreme Court, *In re Newbern* (1960), 53 Cal. 2d 786, held that Penal Code 647 subsec. 11, which made it a misdemeanor to be a common drunkard, was so vague and uncertain that it was unconstitutional. This might cause the higher courts to review the crime of being a narcotic addict or any crime of status. Although at present no appeal lies from the appellate department of the Superior Court to the District Court of Appeal or the Supreme Court, yet habeas corpus lies to test the constitutionality of the section in question. We would welcome such a test.

Appellant also claims that the court erred in not submitting to the jury the foundation evidence as to whether the search and seizure was lawful. The court acted properly in receiving this evidence outside the presence of the jury. The sufficiency of that foundation evidence is a question of law. In *People v. Gorg* (1955), 45 Cal. 2d 776, the court said at p. 781: "The proba-

tive value of evidence obtained by a search or seizure, however, does not depend on whether the search or seizure was legal or illegal, and no purpose would be served by having the jury make a second determination of that issue."

We have considered all other points urged by appellant and find them without merit.

The order granting probation and order denying motion for new trial are affirmed.

Dated: March 31, 1961.

SWAIN
Presiding Judge

We concur:
HULS Judge
SMITH Judge

APPENDIX B.

Health and Safety Code
of the State of California.

Section 11721. No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail. (As amended California Statutes of 1957, c. 1064, p. 2343, Sec. 1.)

APPENDIX C.

Welfare and Institutions Code of the State of California.

Section 5350. A "narcotic drug addict" within the meaning of this article is any person who habitually takes or otherwise uses to the extent of having lost the power of self-control any opium, morphine, cocaine, or other narcotic drug as defined in Article 1 of Chapter 1 of Division 10 of the Health and Safety Code.

Wherever in this article the term "drug addict" is used, such term shall be construed to refer to and mean "narcotic drug addict" as defined in this section. All persons heretofore committed or admitted as drug addicts to any state hospital, or committed to the Department of Mental Hygiene for placement therein, shall be deemed to have been committed or admitted as narcotic drug addicts. (Stats. 1937, c. 369, p. 1139, Sec. 5350, as amended Stats. 1949, c. 1159, p. 2078, Sec. 2.)

APPENDIX D.

Vehicle Code of the
State of California.

Section 23105. Narcotics. It is unlawful for any person who is addicted to the use, or under the influence, of narcotic drugs or amphetamine or any derivative thereof to drive a vehicle upon any highway. Any person convicted under this section is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for not less than one year nor more than five years or in the county jail for not less than 90 days nor more than one year or by a fine of not less than two hundred dollars ($200) nor more than five thousand dollars ($5,000) or by both such fine and imprisonment. (Stats. 1959, c. 3, p. 1708, sec. 23105.)

APPENDIX E.

Vehicle Code of the
State of California.

Section 24250. *Lighting during darkness.* During darkness, a vehicle shall be equipped with lighted lighting equipment as required for the vehicle by this chapter. (Stats. 1959, c. 3, p. 1714, sec. 24250.)

APPENDIX F.

Vehicle Code of the
State of California.

Section 24601. *License plate light.* Either the rear lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear license plate and render it clearly legible from a distance of 50 feet to the rear. When the rear license plate is illuminated by a lamp other than a required rear lamp, the two lamps shall be turned on or off only by the same control switch at all times and the light source of the additional lamp shall have a minimum of three standard candlepower and a maximum of 15 standard candlepower. (Stats. 1959, c. 3, p. 1717, sec. 24601.)

APPENDIX G.

Vehicle Code of the
State of California.

Section 40800. *Vehicle and uniform used by officers.* Every traffic officer shall wear a full distinctive uniform, and if the officer while so on duty uses a motor vehicle, it must be painted a distinctive color specified by the commissioner.

This section does not apply to an officer assigned exclusively to the duty of investigating and securing evidence in reference to any theft of a vehicle or failure of a person to stop in the event of an accident or violation of section 23109 or in reference to any felony charge, or to any officer engaged in serving any warrant when the officer is not engaged in patrolling the highways for the purpose of enforcing the traffic laws. (Stats. 1959, c. 3, p. 1780, sec. 40800.)

APPENDIX H.

Vehicle Code of the
State of California.

Section 625. *Traffic officer.* A "traffic officer" is any member of the California Highway Patrol and any peace officer when such member or officer is on duty for the exclusive or main purpose of enforcing the provisions of Division 10 or 11 of this code. (Stats. 1959, c. 3, p. 1539, sec. 625.)

APPENDIX I.

Health and Safety Code of the State of California.

Section 11500. Except as otherwise provided in this division, every person who possesses any narcotic other than marijuana except upon the written prescription of a physician, dentist, chiropodist, or veterinarian licensed to practice in this State, shall be punished by imprisonment in the county jail for not more than one year, or in the state prison for not more than 10 years.

If such a person has been previously convicted of any offense described in this division or has been previously convicted of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as an offense described in this division, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the state prison for not less than two years nor more than 20 years. (Stats. 1959, c. 1112, p. 3193, sec. 3.)

APPENDIX J.

Penal Code of the
State of California.

Section 836. *Peace officers; arrest under warrant; grounds for arrest without warrant.*

A peace officer may make an arrest in obedience to a warrant, or may, without a warrant, arrest a person:

1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

2. When a person arrested has committed a felony, although not in his presence.

3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed. (As amended Stats. 1957, c. 2147, p. 3805, sec. 2.)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 554

LAWRENCE ROBINSON,

Appellant,

—v.—

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

APPELLANT'S REPLY BRIEF

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No. 554

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APPELLANT'S REPLY BRIEF

A. Section 11,721 of the Health and Safety Code Denies Appellant's Right, Under the 14th Amendment of the United States Constitution, to Due Process and to Equal Protection of the Laws in That:

(1) *The Said Statute Punishes a Status, Not an Act or Omission.*

While appellee assures the court that the punishment of a status has always been an accepted concept of English and American jurisprudence, several important considerations are overlooked by appellee. In the first place, the English Vagrancy Statute has evolved from a crime of status to the proscription of certain specific acts. Whether or not this has been done in the name of Constitutional Rights, specifically set forth as in our own state and federal constitutions, or merely as a matter of pragmatic evolution of justice, is unimportant. The fact is that it has been

done. In fact, we may take little comfort in relying upon what has happened under English practice when constitutional considerations are before the court. This is true because of the absence of the specifically established rights such as those in the Bills of Rights of the American Jurisdiction.

With respect to the long continued existence of the Vagrancy Laws under the said American Constitutions, it is interesting that in not one case cited by appellee has the United States Supreme Court sustained the validity of such statutes. This, then, makes our present case one of first impression as far as our highest court is concerned. It may be, therefore, that the fact that we have no such decision is not to be credited to the validity of the law as much as to the inability of the typical vagrancy defendant to prosecute his case into the higher courts. This court has, in fact, rendered decisions in connection with vagrancy appeals in at least two instances. In *Lanzetta* v. *New Jersey,* 306 U.S. 451, the "gangster statute" was held unconstitutional, as hereinafter discussed. In the other such case, *Edelman* v. *California,* 344 U.S. 357, 97 L. Ed. 387, two justices of this honorable Court (Black and Douglas, dissenting) held that the section of the California Vagrancy Statute then before the court was clearly unconstitutional, with the majority of this court dismissing the appeal for procedural irregularities.

May we here call the Court's attention to the excellent discussion of the problem here involved in the New York University Law Review, Vol. 37, p. 102, "Vagrancy Reconsidered," which might well have been written in answer to this p ·se of appellee's position. The authors discuss the authorities cited by appellees, together with a number of other learned writers, in arriving at our position that the statute is unconstitutional. With respect to the unrea-

sonableness of the penalization of status, the authors state (p. 108): "Deterrence is realized only when the stimulus is directed toward the actual source of harm. Status criminality differs radically in this respect from conduct criminality. Essential elements of criminal theory—conduct and causation—are ignored or distorted in an attempt to prevent crime through punishment of vagrancy. . . .

"The second basic theoretical distinction between conduct criminality and status criminality is that the latter requires no evidence of actual causation. Recognition of the element of causation is limited to a presumption that the necessary certainty of a cause and effect exists in the relationship between status group and the anticipated future criminal conduct. This presumption does not conform to the basic proposition that there must be some 'rational connection between the fact proved and the ultimate fact presumed.' Status criminality substitutes *suspicion causation* for actual causation. Suspicion causation does not require that 'degree of certainty, regularity, uniformity, and predictability' necessary to demonstrate a causal relation. Until one who has assumed a proscribed status has in fact engaged in criminal conduct, the law at most can make only a qualified guess as to whether a member of the status group is a potential criminal. Under these circumstances, sanctions are meaningless. The stimulus-response basis of criminal law presupposes a clear relationship between the object to be stimulated and the result anticipated. . . .

"Status criminality—over-inclusive in its scope—fails to recognize that there is no inevitable relationship between the behavioral characteristics it seeks to punish and the commission of future crimes, a necessary theoretical conclusion substantiated by actual experience. The imposition of sanctions under such circumstances is meaningless."

We shall quote heavily in the remainder of this brief from the article "Vagrancy Reconsidered," *supra*, which is the most complete and lucid treatment of this subject which this counsel has found to date.

(2) *The Statute Punishes an Involuntary Status.*

While appellees are "fast and loose" with the term "preposterous" in referring to this portion of the argument which this Court deemed of sufficient merit to warrant a hearing, we submit that the analogies submitted in support of this position by appellee are not convincing. The intent of the person who begins to use narcotics is no different from that of a person whose act might result in venereal disease or in becoming an alcoholic. Those well acquainted with the problem know that no addict ever intended to become such. In fact, it is impossible to conceive of the real nature of addiction until one has in fact become addicted, so that it may never be said that one intended the result which he now becomes acquainted with in retrospect.

The attitude and motives of a person who takes a "joy-pop" of heroin is, morally or criminally, no different from that of one who takes a "shot" of whiskey, except perhaps there is the added thrill of the forbidden fruit, no longer present in alcoholic indulgence since the Repeal of the Eighteenth Amendment. The purpose in either case, is to be sociable, to escape the problems of the moment, to feel good or "high." Furthermore, narcotics have been such a hush-hush, little understood, subject until recently that there is an amazing ignorance, until it is too late, of the extremely compulsive and addictive attributes of those products taken at first for pleasure and escape.

Thus, the intent, at most, is to use. The condition which we are here considering is, in itself, an innocent, unintended result of an admittedly wrongful act. In fact, very few

addicts will admit this condition, so reluctant are they to accept the fact that they do not have control over the use of the narcotic and that they are in that despised and helpless category of persons whom the present law classifies as criminals.

(3) *It Punishes a Condition of Mental and Physical Illness.*

Were we able to cite judicial authority specifically in point under this head, we would not have before us a case of first impression. The argument of appellee would thus defeat any such case, so that every time a lawyer wanders into new territory in his quest for justice, he would be defeated by his inability to show a specific case in point.

On the other hand, we have presented the uncontradicted facts which show that we are here punishing the condition of mental and physical illness. It follows upon this, it seems to appellant, that due process would then step in to prevent penal treatment. We have presented the closest analogies that we could find on this point, and we feel that the problem is not one of legislative discretion but rather one of legislative limitation by the requirements of reasonableness, logic, and common sense.

(4) *It Is Vague, Indefinite and Uncertain.*

We return at this point to "Vagrancy Reconsidered":

State legislative definitions of "vagrancy" generally have taken two forms: (1) provisions which are merely colorful epithets, e.g., "rogues and vagabonds," "common drunkard," "habitual loafers," "gamesters," "lewd, wanton and lascivious persons," "brawler," "common prostitute," "stubborn children," "habitual gamblers," and "idle and disorderly persons," and (2) provisions which further attempt to define vagrancy in terms of a particular mode of life, e.g.,

"idle or dissolute," "leading an idle, immoral or profligate course of life," "no visible means of living," "associate of known thieves," "loitering," and "without being able to account for their lawful presence." It is submitted such penal classifications are inherently vague and unreasonable, violating the due process and equal protection clauses of the Fourteenth Amendment. Op. cit., p. 121.

In *Lanzetta* v. *New Jersey*, the Court was faced with void-for-vagueness challenge to a New Jersey act which prohibited being a "gangster," a crime of status similar to those included within the vagrancy concept. Justice Butler, speaking for a unanimous Court, concluded: "The challenged provision *condemns no act or omission;* the term it employs to indicate what it purports to denounce is so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment." *Lanzetta* appears to pull the procedural Amendment." Lanzetta appears to pull the procedural due process foundation out from under the vagrancy concept.

The case involved a New Jersey statute of the type that seek to control "vagrancy." *These statutes are in a class by themselves,* in view of the familiar abuses to which they are put. . . . *Definiteness is designedly avoided* so as to allow the net to be cast at large, to enable men to be caught who are so vaguely undesirable in the eyes of the police and prosecution, although not chargeable with any particular offense. In short, these "vagrancy statutes" and laws against "gangs" are not fenced in by the text of the statute *or* by the subject matter (the two opposing void-for-vagueness interpretations) so as to give notice of conduct to be avoided. Frankfurter, *J.*, dissenting in *Winters* v. *New York*, 333 U.S. 507, 540.

In the more recent case of *Edelman* v. *California,* the Court—presented with a conviction for being a "dissolute person"—dismissed the writ of certiorari as improvidently granted. Justice Black, with whom Justice Douglas concurred, dissented and went on to consider the merits: "The ambiguity and consequent broad reach of this crime of 'dissoluteness' is patent. . . . The provision of this vagrancy statute on its face and as enforced against petitioner is too vague to meet the safeguarding standards of due process of law in this country." A similar view was expressed by Lord Justice Scott in the leading English case of *Ledwith* v. *Roberts,* (1937) 1 K.B. 232 (C.A. 1936): "It seems to me wrong that these old phrases should still be made the occasion of arrest and prosecutions, when . . . the class against which the legislation was directed has ceased to exist. . . . The old phrases have today lost their meaning, but they remain on the Statute Book as vague and indefinite words of reproach. . . . Clear and definite language is essential in penal laws."

In the *Newbern* case the California Supreme Court unanimously held that the "common drunkard" provision of the state vagrancy statute was unconstitutionally vague: "The legal impediment in the statute . . . is that it fails to include a standard of *what inordinate use* of intoxicants makes a person a common drunkard. By its terms the statute leaves to the individual judge or jury the determination of the meaning of the law as well as what proven facts render the accused guilty or innocent." *In re Newbern,* 350 P. 2d 123, 3 Cal. Rptr. 371.

(5) *Double Jeopardy Is Inherent in a Crime of Status.*

Appellee's basic objection to this and the following two sub-sections of our argument, is that the particular provision is not shown to be applicable to the present appellant. We submit, however, that the case principally relied upon

for this position, *United States* v. *Raines*, 362 U.S. 17, 4 L. Ed. 2d 524, had in mind an entirely different situation, one in which a statute generally constitutional is attempted to be invalidated because it might have, in some conceivable contexts, an unconstitutional application.

In our instant case we are faced with the exact reverse situation, one in which we have an actual, not a moot, case, first of all. Secondly, the rule would appear to be that when a present appellant or petitioner can in fact show the unconstitutional application of a law to him or its unconstitutionality upon its face, then the entire scheme of legislation and its entire effect may be shown. See *Thornhill* v. *Alabama*, 310 U.S. 88; *Lanzetta* v. *New Jersey*, 306 U.S. 451.

(6) *The Statute Is an Unwarranted and Unconstitutional Infringement on Freedom of Movement.*

Appellee's argument against our position under this head is, in a word, that addicts should be punished for their condition, without a specific showing of use or possession of a narcotic, simply because they are inclined to commit crimes of addiction or derivative crimes. This approach has been effectively dealt with in "Vagrancy Reconsidered":

The inherent unreasonableness in the criminal treatment of vagrants lies in the fact that, in this class of so-called crimes, we are punishing potential crime, suspected crime, or mere intent to commit crime, at the very most. Under a constitutional system in which arrest on suspicion alone is generally condemned, it seems highly improper and constitutionally suspect to punish as a crime a status which it is thought might be conducive to indulgence in crime. By such legislation, we give coup-de-grace to the unfortunate elements in our population for whom we have given little enough opportunity for education or employment, thereby making them further scapegoats for our social failures.

Vagrancy legislation is necessarily unconstitutional on its face—void-for-vagueness as it violates procedural due process and unreasonable in its classifications under equal protection principles and, more broadly, substantive due process—because it is a manifestation of a concept which attempts to punish a present state of being or a particular type of person. It should be evident that such efforts to identify future criminals inevitably raise constitutional questions. A recent bar association report on the disorderly conduct provisions of the new Illinois Criminal Code summarizes the inescapable problem: "Activity of this sort is so varied and contingent upon surrounding circumstances as to almost defy definition."

(7) *It Is Ex Post Facto.*

The analogy of possession of alcohol is unhappy with respect to the condition of narcotics addiction, in view of the fact that, in our present state of medical knowledge, no cure for addiction has been found. Thus, while a possessor of alcoholic beverages necessarily is engaged in a voluntary act, just the opposite would appear to be true of a person once addicted. The fact that the instant appellant has not been shown to have an addiction pre-dating the proscriptive statute is of no avail to appellee, since the "ex post facto" aspect of the law is apparent upon its face.

(8) *It Imposes Cruel and Unusual Punishment.*

The same is true of our position that the statute imposes cruel and unusual punishment. A statute may be unconstitutional upon its face or in its application. By necessary implication, since no provision is made for the tapering off of the condition and since the court may take judicial notice of what happens in "cold turkey" withdrawals, we re-submit that the law here involved is unconstitutional both upon its face and in its application. To negative this

position it is necessary for appellee to show that, although no provision for humane treatment of addiction of incarcerated addicts is provided in the law, such in fact is the practice of the California authorities. This, of course, would be impossible for appellee to establish.

B. Section 11,721 of the California Health and Safety Code Is an Unreasonable Exercise of the Police Power, in That It Inherently Lends Itself to Police Abuse by Way of Arrest on Suspicion and Discriminatory Enforcement.

For our discussion under this head, we shall quote from "Vagrancy Reconsidered": There are, in addition to the invalidity of the statutes themselves, constitutional objections to the practical results of the application of vagrancy legislation by law enforcement officials. Vagueness derived from the absence of a requirement of conduct is as significant in the administrative context as it is in questioning the prima facie constitutionality of the statutes.

The opportunities for abuse which status criminality inherently fosters are most apparent in the realm of police administration. Prevention of future criminality, the primary rationale of vagrancy laws, has little significance for law enforcement officials. There would appear to be slight concern with the "economic vagrant," the "offensive pest," or the "potential criminal." Rather the vagrancy laws, vaguely phrased, requiring no showing of specific criminal conduct for conviction, and under which arrest without a warrant is generally permitted, have provided the police with an effective tool for circumventing the "real or imagined defects in criminal law and procedure." Two major abuses are attributable to the immense discretionary power accorded the police.

(1) *Arrest on Suspicion.*

An officer may arrest for a felony without a warrant if he makes a showing of probable cause. An arrest without a warrant is illegal if made "without any reasonable belief by the officer in the guilt of the party arrested." Such an arrest is an intentional tort for which a civil action may be brought against the offending officer. Arrest without probable cause is also unconstitutional under the fourth and fourteenth amendments.

Deprived of the right to arrest merely on suspicion, the police have used vagrancy legislation to accomplish under color of legal right an illegal object. So long as the vagrancy laws exist there is a statutory misdemeanor available to justify the apprehension of a person suspected of a felony, and whether the suspect is subsequently convicted or acquitted under the vagrancy statute, or released without trial, the object has been accomplished with relative impunity.

The apparent ease with which the police are thus able to utilize the vagrancy statutes is based on two facts. First, with respect to a substantial proportion of suspects, their "utter impotence . . . is ample guarantee that they will not employ attorneys or otherwise annoy the police." Second, the vague definitions of vagrancy confer on an officer discretion so broad that technically he can seldom be held not to have had probable cause for the arrest.

Clearly, arrest on suspicion is a subversion of the several purposes for which the vagrancy statutes were enacted. For obvious reasons, discovery by the courts of such practices is difficult at best. It would seem that the abuse is not amenable to effective supervision by the judiciary. The fault lies more with the statutes than with the absence of appellate review.

(2) *Selectivity of Application and Equal Protection.*

While the equal protection clause of the fourteenth amendment is usually employed to invalidate discriminatory laws, selective and discriminatory application of valid laws is equally within its scope. Though there is evidence that state courts have "never been fully converted to the proposition," decisions in several jurisdictions reflect an awareness of deliberately discriminatory law enforcement. Selectivity in the application of law may be the product of quantitive exigency or of conscious policy. The difficulty usually results from the indefiniteness or breadth of statutory language, which poses for the police a potentially overwhelming problem in terms of numbers alone.

It is generally recognized, however, that "lax enforcement of a law or ordinance violates no constitutional rights." It is conscious selection which is abusive.

First, there is evidence that minority groups receive disproportionate attention. A Southern justice once indicated that the vagrancy laws should be rigidly enforced "against the colored population especially because many of them do lead idle and vagrant lives . . ." It is believed that this bias persists among law enforcement officials in certain areas of the country. Second, vagrancy statutes "have been used to harass (so-called) notorious criminals whom it is impossible to convict for major offenses." Attacks on such use of the statutes question the utility of selective enforcement.

The third aspect of selective application involves quasi-judicial regulation of undesirables. Here the selectivity is based less on the personal characteristics or past history of an individual than it is on "geographical" considerations. A "nonresident" vagrant is almost automatically subject to punishment while a person of identical description and

personal circumstances, except for the fact that he is not a transient, is less likely to be incarcerated.

Admittedly, any criminal statute can be administered capriciously by officials intent on prosecuting or harassing an identifiable class or group. The vagrancy laws, however, have been particularly amenable to such abuse because of their inherent vagueness. There is no specific criminal act upon which arrest and convictions are predicated. Again, the judiciary is confronted by the problem of supervising statutes which, under color of legal right, are easily used to perpetrate violations of constitutional rights. Supervision is not enough if the statutes are so drawn as to fail to insure "procedure which will protect persons against the ills arising out of the whims and caprice of officials."

The immediate result of properly drawn conduct statutes would be incarceration of those members of the vagrancy status groups who actually engage in criminal conduct. Crime would be prevented by apprehending criminals and applying sanctions commensurate with the offense. Adherence to traditional criminal theory also contributes to the long-range interest in crime prevention. The source of harm is properly identified and the relationship between harm and source is established when conduct is the foundation of law enforcement. The stimulus of punishment is properly directed toward the source of harm, the desired response can be predicted and the theory of deterrence is accommodated.

The second element of social concern—the "nuisance" aspect of the judicial rationale for punishment of vagrants—should be completely discarded. "The economic purposes which once gave vagrancy a function no longer exist, and the philosophy and practices of welfare agencies have so changed relief methods that a criminal sanction to enforce Elizabethan poor law concept is outdated." Penal legis-

lation should not reflect a concern, which, while a legitimate object of society's attention, is not the proper object of criminal sanctions. While the economic clauses of the vagrancy laws defer ostensibly to this proposition by providing that a man is never to be punished when he is unable to obtain employment, the distinctions between the unemployed and the alcoholics, degenerates, and idle wanderers frequently seem tenuous. Such social problems should be resolved through social welfare and rehabilitation measures.

Individual liberty is also protected through strict reliance upon conduct criminality. First, the provisions of statutes embodying conduct criminality define in comprehensible terms those acts which are subject to punishment, thus providing satisfactory criteria for the identification of the criminal and forewarning the individual of the consequences of specific conduct. Second, suspicion causation and the arbitrary attribution of criminal responsibility is replaced by a clear causative relation between the prescribed conduct and the resulting harm. Third, conduct criminality provides tangible standards which are amenable to effective judicial supervision. Legislation which tends to disguise the fact of arrest on suspicion is eliminated and the judiciary is able to distinguish more readily between bona fide arrests for the statutory misdemeanor and arrests which serve ulterior motives. Selective enforcement is also more easily revealed where there is a clear delineation of the grounds for arrest and conviction.

Comprehensive reform of the abuses attributable to status criminality can be effected only through legislation which completely abolishes the vagrancy concept—a doctrine which finds its only support in two centuries of uncritical American legislative and judicial acceptance of outmoded English precedent. "England got rid of that concept." It is time for America to do the same.

Summary and Conclusion

We have no quarrel with the broad, general statement of appellee that laws regulating the use of narcotics are properly within state police power. However, the said statement does not beg the question, but rather skirts it. The question presented by our points and authorities is not whether states may legislate in this field, in the abstract, but whether the specific state provision goes beyond proper and constitutional sanctions or controls. Specifically, it is our contention that Section 11,721 penalizes a status of mental and physical illness of an involuntary nature. We further contend that such a penal approach is in contravention of the state and federal constitutional standards.

The United States Supreme Court case cited in support of this uncontradicted general power does not negative our position argued herein. And while certain cases cited by appellee do support the vagrancy laws generally, it is interesting that the legislature has now outlawed all vagrancy laws in the State of California (which were numerous and served as catchalls and traps for the unwary, there being twelve subheadings in Section 647 of the Penal Code), except for the residual one proscribing the status of addiction to narcotics. This latter was, as previously pointed out, originally included in the said vagrancy statute, later being given special treatment in the Health and Safety Code and being deleted from the Penal Code. The criminal approach to a status or condition remained intact, after the said legislative amendment.

The approach taken by the 1961 session of the California legislature in so outlawing the provisions which the courts strained to justify in the cited opinions, indicates an attempt to rid this State of the unconstitutional penalization

of status as such. That the one remaining such status was not included in the legislative effort might well have been merely an oversight.

Be that as it may, the Appellate Department of the Superior Court, in the instant case, has indicated the serious question in its mind re the constitutionality of the criminalization of the status of addiction, requesting, however, that higher courts than itself make such a determination. It is to that end that this appeal is taken.

A determination of unconstitutionality would not "render impossible laws which are generally admitted to be essential to the well-being of society." Laws prohibiting the non-medical dealing in narcotics would be untouched, and it is at this level that proscription has validity and may be effective. On the other hand, the invalidation of the criminal treatment of addiction would encourage a humane, medical treatment of the victims of illegal drug trafficking, which again is the only approach which would show some promise of accomplishing the legislative intent to curb the traffic.

Respectfully submitted,

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